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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
AND FEDERAL LABOR RELATIONS AUTHORITY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether pay adjustments of federal employees whose rate of compensation is fixed by the agency-employer rather than by statute are negotiable "conditions of employment" under 5 U.S.C. 7103(a)(14).

2. Whether a bargaining proposal relating to pay interferes with management's right to "determine" its budget under 5 U.S.C. 7106(a)(1), where the agency failed to demonstrate either: (a) that the proposal would prescribe an amount that had to be allocated to the agency's budget, or (b) that the proposal would result in substantial and unavoidable cost increases that would not be offset by compensating benefits.

3. Whether bargaining over pay adjustments is inconsistent with the Nuclear Regulatory Commission's discretion under the Atomic Energy Act, under which the agency had made a unilateral decision to depart from the Classification Act and to fix the compensation of its employees.

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UNITED STATES NUCLEAR REGULATORY COMMISSION
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The National Treasury Employees Union petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The en banc decision of the court of appeals (Pet. App. 1a-20a) is unreported. The panel decision of the court of appeals (Pet. App. 21a-41a) is reported at 859 F.2d 302. The decision of the Federal Labor Relations Authority (Pet. App. 42a-51a) is reported at 29 F.L.R.A. 217.

JURISDICTION

Rehearing en banc was granted on January 6, 1989, and the judgment of the court of appeals on rehearing en banc (Pet. App. 19a) was entered on July 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

A. The Federal Service Labor-Management Relations Statute

Section 7102 (5 U.S.C.) provides in relevant part:

> Each employee shall have the right * * *
>
> * * * *
>
> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

Section 7103 (5 U.S.C.) provides in relevant part:

> (a) For the purpose of this chapter—
>
> * * * *
>
> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters
>
> * * * *
>
> (C) to the extent such matters are specifically provided for by Federal statute[.]

Section 7106(a)(1) (5 U.S.C.) provides:

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
>
> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency.

Section 7117 (5 U.S.C.) provides in relevant part:

> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or reg-

ulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

B. The Atomic Energy Act

Section 161(d), 42 U.S.C. 2201, provides in relevant part:

> In the performance of its functions the Commission is authorized to appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission. Such officers and employees shall be appointed in accordance with the civil-service laws and their compensation fixed in accordance with the Classification Act of 1949, as amended, except that, to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws: *Provided, however*, That no officer or employee (except such officers and employees whose compensation is fixed by law, and scientific and technical personnel up to a limit of the highest rate of grade 18 of the General Schedule of the Classification Act of 1949, as amended) whose position would be subject to the Classification Act of 1949, as amended, if such Act were applicable to such position, shall be paid a salary at a rate in excess of the rate payable under such Act for positions of equivalent difficulty or responsibility . . .

STATEMENT

A. Statutory Background

This case arises under the Federal Service Labor-Management Relations Statute (the Statute), which is Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.* The Statute grants federal employees the right to form and join unions (5 U.S.C. 7102) and requires federal agencies and employee unions to bargain in good faith with respect to "conditions of employment." 5 U.S.C. 7103(a)(12). That term is defined to include "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions," excluding only matters relating to prohibited political activities or to the classification of positions and matters "specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14).

All matters falling within this expansive definition of "conditions of employment" are negotiable, except those matters that are explicitly excluded elsewhere in the Statute. For example, the Statute excludes from the duty to bargain any proposals that are "inconsistent with any Federal law." 5 U.S.C. 7117(a)(1). Moreover, 5 U.S.C. 7106 provides that "nothing in this chapter shall affect the authority of any management official of any agency" with respect to certain enumerated management rights.[1] Those listed management rights include the authority "to determine the . . . budget . . . of the agency." 5 U.S.C. 7106(a)(1).

Negotiability disputes, such as the one presented here, arise when an agency declines to bargain over a union

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[1] The authority reserved to management in 5 U.S.C. 7106(a) is subject to section 7106(b), which specifies that the management rights provision does not "preclude any agency and any labor organization from negotiating" with regard to the "procedures which management officials of the agency will observe in exercising any authority under this section" and with regard to "appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials."

proposal on the ground that it does not come within the duty to bargain. A union may then appeal the agency's refusal to the Federal Labor Relations Authority (FLRA or the Authority), which decides whether there is an obligation to bargain over the matter in question. 5 U.S.C. 7117(c). If the FLRA finds a proposal negotiable, it does not address the merits of the proposal but simply orders the agency to bargain in good faith.

B. Factual background and the proceedings below

1. *Proceedings before the FLRA*

Petitioner National Treasury Employees Union (NTEU or the Union) instituted the proceedings below by filing a negotiability appeal with the FLRA pursuant to 5 U.S.C. 7117(c). The Nuclear Regulatory Commission (NRC or the Agency) had refused to negotiate regarding a union proposal that sought to establish a formula for determining annual cost of living adjustments for bargaining unit employees represented by NTEU. The proposal provided, in pertinent part, as follows (Pet. App. 42a-43a):

> Section 52.1
>
> The salary structure, that is the grade and steps of the pay schedule, being used by the NRC will be maintained. Hereafter, all employees will have their current salaries adjusted for the cost of living/comparability factor. The adjustment will be equal to the statistical adjustment recommended to the President by the [Advisory Committee on Federal Pay]. This adjustment will become effective at the beginning of the first pay period following the announcement of it by the [Committee] or other appropriate sources. It will be unaffected by Presidential or Congressional actions.[2]

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[2] The Union's proposal would thus base annual adjustments on the yearly recommendations made by the independent Advisory Committee, which determines the difference between federal and

Section 52.2

> NTEU agrees to establish with the employer a productivity committee that will monitor the impact of the new salary adjustment system and seek reasonable ways to increase the productivity of the employer, e.g., decrease employee turnover, remove work obstacles, improve upon available machines and procedures, and raise employee morale.

Upon NTEU's petition for review, the FLRA ordered the NRC to negotiate with the union, finding the salary proposal to be within the agency's duty to bargain. (Pet. App. 49a). Under long established FLRA precedent, compensation is a "condition of employment" within the general duty to bargain under the Statute, as it was under the Executive Order program that had previously governed labor-management relations in the federal sector. *See American Federation of Government Employees, AFL-CIO, Local 1987 and Department of the Air Force, Eglin Air Force Base, Florida (Eglin)*, 24 F.L.R.A. (No. 41) 377, 380-82 (1986). In rejecting NRC's arguments, the Authority relied on its consistent position that nothing in the Statute or its history precludes bargaining over employee wage proposals where "(1) the matters proposed are not specifically provided for by law and are within the discretion of the agency and (2) the proposals are not otherwise inconsistent with law, Government-wide rule or regulation or an agency regulation for which a compelling need exists" (Pet. App. 46a, *citing Eglin*).

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private sector salaries pursuant to the Federal Pay Comparability Act, 5 U.S.C. 5301 *et seq.* In recent years, the President has recommended alternative pay plans and the actual federal increases ultimately approved by Congress have been significantly lower than those recommended by the Advisory Committee. Under NTEU's proposal, the recommendations of the Committee would be used at NRC, regardless of the pay raise given to other federal workers under the alternative pay plans accepted by the President and Congress.

The FLRA rejected the NRC's argument that the Union's proposal was inconsistent with the Agency's right to determine its budget under 5 U.S.C. 7106(a)(1). Relying on its longstanding two-part test for determining inconsistency with budget rights, the FLRA found that the Union's proposal did not directly interfere with the Agency's right to determine its budget. *See American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (Wright-Patterson)*, 2 F.L.R.A. (No. 77) 604, 607-08 (1980), *enforced as to other matters sub nom. Department of Defense v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, 455 U.S. 945 (1982). As the FLRA explained, the Agency failed to meet its first burden of showing that the proposal prescribes the programs or operations to be included in the Agency's budget or the amount to be allocated for them. Second, the Agency did not make a substantial demonstration that implementation of the proposal "will result in a significant, unavoidable increase in costs which is not outweighed by compensating benefits" (Pet. App. 48a).

The FLRA also rejected NRC's contention that the Union's proposal was inconsistent with the Atomic Energy Act. The FLRA noted that, under that Act, the NRC clearly has discretion with regard to its pay practices. Section 161(d) of the Atomic Energy Act gives the NRC discretion to exempt its personnel from the pay scheme of the Classification Act whenever such action is deemed "necessary to the discharge of [the Agency's] responsibilities." 42 U.S.C. 2201. "The Authority has consistently held that where an agency has discretion over a matter affecting conditions of employment, the agency is obliged under the Statute to exercise that discretion by means of bargaining, unless the discretion is specifically limited by law or regulation." (Pet. App. 46a). The FLRA observed that the NRC had already exercised its statutory discretion to exempt positions

from coverage under the Classification Act. The Authority concluded that the language of the Atomic Energy Act, which allows the NRC to depart from the Classification Act to the extent such departure is "necessary to the discharge of its responsibilities" does not place "a specific limitation on the Agency's discretion to bargain in this matter." (Pet. App. 47a).

2. The decision of the Fourth Circuit panel

The NRC petitioned for review of the Authority's decision to the Court of Appeals for the Fourth Circuit, which had jurisdiction pursuant to 5 U.S.C. 7123. The original panel of that court unanimously upheld the negotiability of the pay proposal. The panel endorsed the FLRA's interpretation of the Statute and its legislative history and deemed compensation matters to be "conditions of employment" subject to collective bargaining, as they were under the predecessor labor-management program pursuant to the Executive Order (Pet. App. 34a). The panel held that the "plain language" of the statute, as well as the statutory policy, supported the negotiability of pay issues and that the "clearly ambiguous" legislative history relied on by the NRC was insufficient to support a contrary reading (Pet. App. 36a).

The panel also rejected the argument that the proposal interferes with the Agency's management right to determine its budget. It expressly endorsed the FLRA's two-part *Wright-Patterson* test for interference. The proposal here did not meet this test because, as the FLRA concluded, it "merely suggested a procedure and ultimately a percentage by which NTEU employee salaries might be adjusted to allow for cost of living increases" while "the NRC retained control of the amount of its budget to be allocated for the salaries." (Pet. App. 38a). Moreover, the NRC "had not 'made a substantial demonstration that implementation of the proposal will result in a significant, unavoidable increase in costs which is not outweighed by compensating benefits'" (Pet. App.

39a). The Agency "failed even to address the issue of compensatory benefits" before the Authority, and the panel refused to bar negotiability merely because the proposal would cause increased expenditures. (Pet. App. 40a). The NRC's construction "would likely render the vast majority of proposals nonnegotiable," and Congress expressly stated that the management right section should " 'be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal.' " (*Ibid.*, *quoting* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 44 (1978)). The panel concluded that the Authority "reasonably concluded that the NRC must show that any anticipated increase in cost was not offset by benefits" (Pet. App. 40a).

Finally, the panel held that the proposal was fully consistent with the NRC's statutory authority to fix wages outside the limits of the Classification Act, pursuant to section 161(d) of the Atomic Energy Act. The Court rejected the Agency's interpretation that the statute prohibited negotiability of pay where, as here, the Agency had unilaterally decided that departure from the Classification Act was necessary to the discharge of the NRC's responsibilities. The NRC's position was contrary to the "plain language" of the Statute; the statutory language "cannot be read to limit the NRC's discretion over its employees' pay once the decision to exempt has been effectuated." (Pet. App. 31a).

3. *The en banc decision of the Fourth Circuit*

Upon rehearing en banc, the panel's ruling was reversed in a split decision. Over the dissent of four members, who relied on the panel's opinion, six members of the en banc court held that negotiable "conditions of employment" do not include compensation. The majority reasoned that Congress would have specifically listed wages as negotiable if it had so intended. (Pet. App. 7a). The majority also rejected the panel's conclusion that the legislative history's statements regarding the non-

negotiability of wages were ambiguous because pay is provided by statute for most government jobs. In the majority's view, the statements of those legislators engaged in the general debate over whether pay should become negotiable in all agencies controlled the specific questions at issue here, *i.e.*, whether pay is negotiable in those few agencies having discretion to set their own pay schedules (Pet. App. 9a-11a).

Five members of the en banc court based their non-negotiability decision on alternative grounds.[3] These members rejected the conclusion of the FLRA and Fourth Circuit panel that the union proposal poses no interference with the management right to determine a budget because it sets no specific dollar amount and was not shown to require significant cost increases without offsetting financial advantages. Dismissing the FLRA's longstanding two-part test, the court summarily concluded that "nothing in the statute requires that this showing [of increased cost without offsetting benefits] be made to the satisfaction of the FLRA." (Pet. App. 16a).

Finally, the same five members concluded that the salary bargaining proposal was inconsistent with section 161(d) of the Atomic Energy Act, under which the NRC earlier had exercised its discretion to depart from the salary schedules of the Classification Act. In their view, "Section 161(d) and the NRC's 1975 decision to opt out of the Classification Act scheme do not provide the agency with unfettered discretion to negotiate over employee compensation." (Pet. App. 17a). Rejecting what the panel had determined to be the plain meaning of section 161(d), the en banc court now adopted a "plain reading" of its own, that vested the NRC with only limited discretion to determine the salary of its employees. Although the NRC had long ago decided to

[3] The same four members who dissented on the main question also repudiated the alternative grounds. A fifth judge expressed no opinion on the alternative grounds.

depart from the Classification Act, the Agency could now claim insufficient discretion over its budget to allow for give and take at the bargaining table (Pet. App. 17a-18a).

REASONS FOR GRANTING THE PETITION

Review is warranted because the court below, in a sharply divided ruling, incorrectly decided three issues of great importance to federal employees and to the government. Moreover, there is a direct conflict among the courts of appeals on the main issue of pay negotiability where compensation is not fixed by statute, as well as a conflict in rationale on the remaining two issues.

I. The ruling below conflicts with the holdings and rationales of two other circuit court opinions on the important question of pay negotiability

A. As the majority opinion below expressly recognized (Pet. App. 6a, n.1), there is a direct conflict in the courts of appeals on the question of whether compensation is a "condition of employment" subject to collective bargaining in an agency whose pay schedules are not fixed by statute. The Eleventh and Second Circuits have answered this question in the affirmative. *Fort Stewart Schools v. FLRA*, 860 F.2d 396 (11th Cir. 1988), *petition for cert. pending*, No. 89-65; *West Point Elementary School Teachers Association v. FLRA*, 855 F.2d 936 (2d Cir. 1988). The en banc Fourth Circuit, in reversing the panel decision in this case, has now joined the Sixth, D.C. and Third Circuits, in holding that pay issues are never negotiable under the Statute. *See Fort Knox Dependent Schools v. FLRA*, 875 F.2d 1179 (6th Cir. 1989) (petition for reh'g pending); *Department of Defense Dependents Schools v. FLRA*, 863 F.2d 988 (D.C. Cir. 1988), *reh'g en banc granted* (Feb. 6, 1989); *Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409 (3d Cir. 1988).

As the government's petition for certiorari in *Fort Stewart* attests, this issue of pay negotiability is a ques-

tion of great importance to large and diverse categories of employees and their agencies (Pet. at 11-12). In view of the conflicting rulings among the courts of appeals on this important and far-reaching question, this Court's review is patently warranted.

B. The second issue in this case, relating to interference with an agency's right to determine its budget, presents another basic question on which the government seeks review in *Fort Stewart*. In that case, the government has sought review "on the question whether compensation-related proposals [violate] management's right to control its budget," even though "[t]here is no express conflict." (Pet. at 12). The intervening en banc ruling in the instant case provides the missing conflict. That is, the ruling below rejects the budget analysis employed in *Fort Stewart* and *West Point*.

In those two cases, the Eleventh and Second Circuits endorsed and applied the FLRA's *Wright-Patterson* test for determining when a proposal is deemed to interfere with an agency's right to set its budget. *West Point*, 855 F.2d at 943-44; *Fort Stewart*, 860 F.2d at 405. Under that test, the Second and Eleventh Circuits readily concluded that particular pay proposals did not interfere with the budget rights of an agency. In the instant case, by contrast, the Fourth Circuit summarily rejected the longstanding FLRA test. Noting the FLRA's position that the NRC failed to demonstrate that the anticipated increase in costs associated with the proposal would be significant and not offset by compensating economic gains, the court declared, without discussion, that "nothing in the statute requires that this showing be made to the satisfaction of the FLRA" (Pet. App. 16a).

Pay proposals that would be negotiable in the Second or Eleventh Circuits, in short, would clearly not be negotiable in the Fourth Circuit. Because the Fourth Circuit has rejected the FLRA test adopted by two other circuits, the review of this Court is necessary to determine

the standards for measuring a pay proposal's possible interference with an agency's right to determine its budget.

C. Finally, the ruling below presents a third issue, similar to the third question presented by the government in *Fort Stewart*, regarding whether statutory provisions giving an agency discretion to set salaries are consistent with bargaining over pay. In yet another sharply divided ruling, the court below held that collective bargaining would be inconsistent with the NRC's statutory authority, under the Atomic Energy Act, to fix pay schedules. In the prevailing view, the NRC's enabling statute did not vest sufficient discretion in the agency to set pay scales, even after the NRC unilaterally decided that it was "necessary to the discharge of its responsibilities" to depart from the pay schedules of the Classification Act.

Although there could be, of course, no direct conflict on this issue in any case not involving the same enabling statute, the approach taken by the Fourth Circuit plainly conflicts with the rationale of the Second and Eleventh Circuits in assessing the Army's discretion under a different statute. In *Fort Stewart* and *West Point*, the courts held that there was no inconsistency between a pay proposal and a statutory provision requiring the Army "to the maximum extent practicable" to provide a comparable education to local public schools at a cost per pupil not exceeding the per pupil cost of free public education in local communities. *Fort Stewart*, 860 F.2d at 402-05; *West Point*, 855 F.2d at 942-43. Both courts held that the statute gave the Army such broad discretion to set wages that bargaining over pay would not interfere with the statute's standards.

In the instant case, by contrast, the court of appeals decided that the "necessary to the discharge of its responsibilities" standard narrowed the Agency's discretion to such an extent that collective bargaining would be inconsistent with the statute. The Fourth Circuit's

view of an Agency's statutory discretion over pay, therefore, is materially different from the view taken by the Second and Eleventh Circuits. A relatively vague limitation on an agency's discretion would make pay nonnegotiable in the Fourth Circuit, while the same sort of limitation on agency discretion would have no effect on pay negotiability in the Second and Eleventh Circuits.

This case thus presents a conflict, not posed by the government's *Fort Stewart* petition, regarding the extent to which an agency's statutory discretion to set wages may be deemed to bar collective bargaining. Review by this Court is necessary to set uniform standards for assessing the consistency between a pay proposal and an agency's statutory discretion to set wages.

II. The lower court wrongly decided each of the three questions presented

A. As both the Second and Eleventh Circuits (as well as the panel in this case) readily concluded, compensation squarely falls within the category of "conditions of employment" expressly made negotiable by the Statute. This conclusion is firmly supported by the FLRA's extensive analysis of the question in *Eglin*, 24 F.L.R.A. 377. The statute defines the phrase as including within its broad sweep all "personnel policies, practices, and matters . . . affecting working conditions." 5 U.S.C. 7103(a)(14). As the panel below concluded, the "plain language" of the Statute includes wages (Pet. App. 36a). In fact, a subject as central to the employment relation as employee compensation is *the* key personnel policy or "condition of employment." The lower court's contrary conclusion was based on its misunderstanding of two basic points.

First, the lower court erred in believing that the National Labor Relations Act draws a distinction between pay and conditions of employment. The NLRA permits

bargaining over "wages, hours, and *other* terms and conditions of employment." 29 U.S.C. 158(d) (emphasis supplied). The use of the word "other" in the NLRA establishes that Congress viewed wages, among other things, to be conditions of employment. Both the courts and the NLRB have consistently held that "conditions of employment" encompass employee compensation matters under that statute. *See Richfield Oil Corp. v. NLRB*, 231 F.2d 717, 724 (D.C. Cir.), *cert. denied*, 351 U.S. 909 (1956); *Inland Steel Co. v. NLRB*, 170 F.2d 247, 253 (7th Cir. 1948), *cert. denied on this issue*, 336 U.S. 960 (1949); *Weyerhaeuser Timber Co.*, 87 NLRB 672 (1949). The NLRA thus defeats, rather than supports, the lower court's decision.[4]

Second, the court of appeals seriously misconstrued the statutory background and legislative history. The court's opinion fails even to mention the crucial fact that Congress expressly adopted all prior rulings of the Federal Labor Relations Council (FLRC) under the predecessor labor-management program governed by Executive Order, so long as those rulings were not specifically superseded. 5 U.S.C. 7135(b). The duty to bargain under the Executive Order extended to the same personnel policies, practices, and matters affecting working conditions that are

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[4] Similarly, the court erred in believing (Pet. App. 8a-9a) that the Statute itself draws a distinction between "conditions of employment" and "pay and pay practices" under section 704 (*reprinted at* 5 U.S.C. 5343 note), which relates to prevailing rate employees. That section by necessity used both phrases, but not in any mutually exclusive fashion. As explained in *Fort Stewart*, 704(a) merely clarifies that certain prevailing rate employees would continue to be able to bargain over employment benefits and other conditions of employment. 860 F.2d at 400-01. Section 704(b) goes on to clarify that with respect to a particular kind of condition of employment—namely, pay matters—employees would retain their negotiating rights notwithstanding other statutory and regulatory provisions that specifically address pay practices concerning the employees in question. Nothing in this section, however, suggests that conditions of employment do not generally include pay matters.

now negotiable under the 1978 Statute. *See Eglin*, 24 F.L.R.A. at 382. The FLRC consistently held that the duty to bargain extended to pay proposals where wages were not set by statute. *See, e.g., Overseas Education Ass'n, Inc. and Dept. of Defense, Office of Dependent Schools*, 6 FLRC 231 (1978); *United Federation of College Teachers, Local 1460 and U.S. Marine Academy*, 1 FLRC 211 (1972). In absence of evidence to the contrary, of course, Congress is presumed to have been aware of, and to have adopted, administration interpretations of a preexisting law. In this instance, Congress affirmatively expressed its intent to adhere to prior rulings of the FLRC.[5]

The legislative history cited by the Fourth Circuit is woefully insufficient to overcome this concrete evidence that Congress intended negotiable conditions of employment to include wage proposals where pay is not fixed by statute. The legislative history of the Statute contains statements that pay is non-negotiable only because there had been a raging legislative debate over whether to make pay proposals negotiable in all agencies; numerous legislators thus stated that the system of fixing pay by statute for the vast majority of federal employees was retained. "A close examination of the congressional reports and debates reveals that the [Statute's] supporters made these statements with the understanding that Congress generally regulates such matters . . ., not with the understanding that the [Act] barred all wage negotiations." *Fort Stewart*, 860 F.2d at 401.

B. The lower court also erred by summarily rejecting the two-part test the FLRA has devised to assess interference with budget rights and by holding that the pay

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[5] Moreover, Congress intended to *broaden*, not narrow, the scope of the duty to bargain that had existed under the Executive Order. *National Treasury Employees Union v. FLRA*, 810 F.2d 295, 299 (D.C. Cir. 1977); *Library of Congress v. FLRA*, 699 F.2d 1280, 1283-86 (D.C. Cir. 1983); *Department of Defense v. FLRA*, 659 F.2d at 1154-56.

proposal is non-negotiable because it "would divest the NRC of substantive decisionmaking authority over its budget." (Pet. App. 16a).

First, the FLRA is entitled to deference in determining the standards for assessing the effect a bargaining proposal would have on an agency's right to determine its budget. As the Second and Eleventh Circuits recognized, the Authority consistently has applied its well reasoned *Wright-Patterson* standards,[6] and courts are not free to jettison those standards without substantial justification.

In any event, the "test" the lower court substituted for the FLRA's extensive standard is wholly unworkable, for virtually every bargaining proposal would "divest" the agency of "substantive decisionmaking authority over its budget" by necessitating the expenditure of some agency funds. The only proper inquiry, as the FLRA and the Second and Eleventh Circuits have concluded, is to measure 1) how directly the proposal affects the budget and 2) to what extent the agency's cost would be increased without offsetting economic advantages. Under this test, as the four dissenters concluded below without contradiction, the NRC falls far short.

C. Finally, the lower court erred by concluding that the pay proposal was inconsistent with section 161(d) of the Atomic Energy Act, which authorizes the NRC to except its employees from the salary strictures of the Classification Act. The lower court reasoned that, despite the NRC's 1975 unilateral decision that it was "necessary to

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[6] *See, e.g., National Treasury Employees Union and Department of the Treasury, U.S. Customs Service*, 21 F.L.R.A. (No. 2) 6 (1986); *American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management*, 22 F.L.R.A. (No. 29) 307, 311 (1986), *enforced mem. sub nom. Office of Personnel Management v. FLRA*, 829 F.2d 191 (D.C. Cir. 1987); *National Treasury Employees Union and Internal Revenue Service*, 27 F.L.R.A. (No. 25) 132, 139 (1987).

the discharge of its responsibilities" to opt out of the Classification Act, the Agency did not have sufficient statutory discretion to negotiate over employee compensation. On the contrary, as the four dissenters concluded, the record here demonstrates that the Agency had effected a blanket exemption for all its employees from the Classification Act. Having taken that step, the Agency clearly possessed adequate discretion, under any proper test, to bargain over the Union's proposal for cost of living adjustments. To conclude otherwise is to bar negotiation where a statute provides any guidelines at all regarding an agency's ability to fix compensation, even where the agency itself had concluded that the statutory standard had been met.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3182

NUCLEAR REGULATORY COMMISSION,
Petitioner,

versus

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority

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Argued: April 10, 1989 Decided: July 14, 1989

Before ERVIN, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON, and WILKINS, Circuit Judges, sitting en banc.*

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* Judge Winter did not participate in the decision in this case.

Robert Kenneth Rasmussen (William H. Briggs, Jr., Solicitor; E. Leo Slaggie, Deputy Solicitor, Mary K. Hembree, Office of the General Counsel, U. S. NUCLEAR REGULATORY COMMISSION; Dennis C. Dambly, Deputy Assistant General Counsel for Administration; Marvin L. Itzkowitz, Senior Counsel for Labor and Personnel on brief) for Petitioner. William Eugene Persina, Deputy Solicitor (Ruth E. Peters, Solicitor; Jill A. Griffin, FEDERAL LABOR RELATIONS AUTHORITY on brief) for Respondent. Gregory O'Duden, Deputy Director of Litigation (Lois G. Williams, Director of Litigation, NATIONAL TREASURY EMPLOYEES UNION on brief) for Intervenor.

WILKINSON, Circuit Judge:

The Nuclear Regulatory Commission (NRC) petitions for review of an order of the Federal Labor Relations Authority (FLRA) directing the NRC to bargain in good faith over a salary proposal advanced during collective bargaining by the National Treasury Employees Union. *See National Treasury Employees Union & Nuclear Regulatory Comm'n*, 29 FLRA (No. 19) 217 (September 29, 1987). The FLRA cross-petitioned for enforcement of its order and this court granted the union's motion for leave to intervene in these proceedings. We hold that the NRC is not obligated to bargain over the union's salary proposal and therefore grant the NRC's petition for review. The FLRA's decision is reversed and enforcement of its bargaining order is denied.

I.

A.

Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-35, recognizes the right of federal employees to belong to unions and establishes a col-

lective bargaining system for the federal sector. Although Title VII provides for employee and union participation in the public sector, it is not simply an "employees' rights statute." *United States Department of Health & Human Services v. FLRA*, 844 F.2d 1087, 1089 (4th Cir. 1988). Rather, Congress expressly recognized in Title VII "the special requirements and needs of the Government," and sought to balance these interests against the rights of employees to participate in labor organizations. *See* 5 U.S.C. § 7101(b). Public sector labor relations differ therefore in important respects from those of the private sector. *See* 124 Cong. Rec. S14,281 (daily ed. Aug. 24, 1978) (remarks of Sen. Sasser), *reprinted in Subcommittee on Postal Personnel and Modernization of the House Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 1014 (1979) [hereinafter *Legislative History*]. While salaries and benefits are often the central subject of private-sector collective bargaining, most wages in the public sector are set by statute. Also, unlike private-sector bargaining, many matters in the public sector are not negotiable because agencies and unions are not free to contravene standards which have been enacted into law.

In general, Title VII obligates federal employers and employee unions to engage in collective bargaining over "conditions of employment." *See* 5 U.S.C. §§ 7114(a)(4), 7103(a)(12) & 7103(a)(14). The duty to bargain does not extend, however, to contract proposals which are "inconsistent with any Federal law or any Government-wide rule or regulation," 5 U.S.C. § 7117(a)(1), or which interfere with certain prerogatives reserved by statute to agency management. *See* 5 U.S.C. § 7106. Federal agencies and employee organizations must make good faith efforts to reach agreement on conditions of employment not excluded from the bargaining process. *See* 5 U.S.C.

§ 7114(a)(4). But, again unlike private-sector bargaining, the public sector provides a mechanism that can compel the adoption of a negotiable proposal. If the parties fail to agree on a negotiable contract proposal, Title VII provides for third-party resolution of the dispute. *See* 5 U.S.C. §§ 7119(b), 7119(c)(5)(B) & 7119(c)(5)(C). Title VII's duty to bargain over a contract proposal subjects the agency to the possibility that the Federal Service Impasses Panel will resolve the dispute by imposing a binding proposal upon the agency. *See* 5 U.S.C. §§ 7119(b), 7119(c)(5)(B) & 7119(c)(5)(C).

B.

The Nuclear Regulatory Commission administers the Atomic Energy Act of 1954, *see* 42 U.S.C. §§ 2011 *et seq.*, and is charged with overseeing the development, utilization, and control of nuclear technology so as to promote the general welfare and security of the United States. *See* 42 U.S.C. §§ 2011-13 & 2201. The National Treasury Employees Union is the exclusive representative of a bargaining unit comprising all professional, nonprofessional, and wage-earning employees of the NRC, with the exception of managers, supervisors, or "confidential employees" as defined in 5 U.S.C. § 7103(a)(13).

In October of 1984, during the course of collective bargaining, the union submitted a proposal to the NRC which included a periodic cost-of-living adjustment. The proposal provided in pertinent part that:

> [t]he salary stucture, that is the grade and steps of the pay schedule, being used by the NRC will be maintained. Hereafter, all employees will have their current salaries adjusted for the cost of living/comparability factor. The adjustment will be equal to the statistical adjustment recommended to the President by the [Advisory Committee on Federal Pay, *see* 5 U.S.C. § 5306]. This adjustment will become effective at the announcement of it by the [Committee]

> or other appropriate sources. It will be unaffected by Presidential or Congressional actions.

The NRC refused to bargain, finding the contract proposal nonnegotiable. The agency objected, *inter alia*, to the fact that the Advisory Committee's recommendations would be "unaffected by Presidential or Congressional actions," noting that the Committee frequently recommends increases well above those passed by Congress and signed by the President. The agency determined that the union's proposal would violate Title VII's "management rights clause" by affecting management decisions to determine the agency's budget. *See* 5 U.S.C. § 7106(a)(1). The NRC also believed the salary proposal to be inconsistent with the statutory requirements of the Atomic Energy Act, *see* 42 U.S.C. § 2201(d), and therefore nonnegotiable pursuant to § 7117 of Title VII.

On March 20, 1986, the union petitioned the FLRA for review of the NRC's nonnegotiability determination. The FLRA ordered the NRC to negotiate with the union, finding the salary proposal within the agency's duty to bargain. *National Treasury Employees Union & Nuclear Regulatory Comm'n*, 29 FLRA (No. 19) 217 (September 29, 1987). According to the FLRA, the union's proposal was a negotiable "condition of employment," 5 U.S.C. § 7103(a)(14), did not violate the NRC's right to determine its budget under 5 U.S.C. § 7106, and was not "inconsistent" with any provision of the Atomic Energy Act, 42 U.S.C. § 2201(d). *See* 5 U.S.C. § 7117(a)(1). The NRC petitioned for review of the FLRA's decision. A panel of this court enforced the FLRA's bargaining order. *Nuclear Regulatory Comm'n v. FLRA*, 859 F.2d 302 (4th Cir. 1988). Review by the en banc court followed.

II.

Title VII of the Civil Service Reform Act grants federal employees the right to negotiate over "conditions of

employment." 5 U.S.C. § 7102(2). *See also* 5 U.S.C. §§ 7101(a)(1)(C) & 7114(a)(4). The NRC asserts that the statutory term "conditions of employment" does not include compensation. We agree. Title VII does not authorize labor organizations and federal agencies to negotiate over employee pay.[1]

"Conditions of employment" are defined in Title VII as those:

> personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or
>
> (C) to the extent such matters are specifically provided for by Federal statute. . . .

5 U.S.C. § 7103(a)(14). As with any case of statutory interpretation, "our analysis must begin with the language of the statute itself." *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). A plain reading of the text indicates that Congress did not include em-

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[1] The Third, Sixth, and District of Columbia Circuits also have concluded that Congress did not intend to subject the pay of federal employees to collective bargaining under Title VII of the Civil Service Reform Act. *See Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409 (3d Cir. 1988); *Fort Knox Dependent Schools v. FLRA*, —— F.2d ——, No. 87-3395 (6th Cir. May 11, 1989); *Department of the Treasury, Bureau of Engraving & Printing v. FLRA*, 838 F.2d 1341 (D.C. Cir. 1988). *See also Department of Defense Dependents Schools v. FLRA*, 863 F.2d 988 (D.C. Cir. 1988) (vacated for rehearing en banc). *But see Fort Stewart Schools v. FLRA*, 860 F.2d 396 (11th Cir. 1988); *West Point Elementary School Teachers Ass'n v. FLRA*, 855 F.2d 936 (2d Cir. 1988).

ployee pay within the statutory definition of bargainable matters. There is no evidence in the statutory text that Congress intended for federal agencies and employee unions to negotiate over employee compensation where such compensation is not set by statute. No statutory reference to compensation exists, nor is any language used that would suggest compensation, such as "terms" of employment.

The FLRA argues, however, that "[t]here is no express exclusion of wages and fringe benefits" from the definition of bargainable matters under the statute. This view stands the inquiry on its head and presupposes that wages are a bargainable item in the first place. It is for Congress to affirmatively denominate a subject as one for collective bargaining. Statutory text is a more reliable guide for judicial interpretation than is statutory silence. In the absence of an affirmative congressional expression, we refuse to expand the scope of bargaining by implication to include employee compensation. Such an important matter as bargaining over wages should not be left to vague intimation or oblique reference.

No intent to permit general public-sector wage bargaining is evident in the language, structure, or legislative history of Title VII. As to language, Title VII's definition of "conditions of employment" must be read against the background of other collective bargaining schemes such as the National Labor Relations Act (NLRA). *See* 29 U.S.C. §§ 151 *et seq.* Significantly, the scope of collective bargaining under the NLRA extends to "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). Congress was fully cognizant of the NLRA when Title VII was enacted, *see* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 41-42 & 50 (1978), *reprinted in Legislative History* at 687-88 & 696; S. Rep. No. 95-969, 95th Cong., 2d Sess. 97 & 106, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2819 & 2828, *and in Legislative History* at 757 & 766, and its use of the

term "conditions of employment" rather than the NLRA's broader definition implies a "narrower range of bargainable matters" under Title VII than under the NLRA. *Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1416 n.14 (3d Cir. 1988). *But see Fort Stewart Schools v. FLRA*, 860 F.2d 396, 400 (11th Cir. 1988). "In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment," *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring); a definition which does not include employee pay. Indeed, we are unaware of any other collective bargaining statute which equates "conditions of employment" with employee compensation. *See, e.g.*, 20 U.S.C. § 902(a) (Overseas Pay Act) (distinguishing between "the payment of compensation" and "conditions of employment").

This interpretation of Title VII is supported by the structure of the Civil Service Reform Act. Section 704 of the Act, for example, preserves the collective bargaining rights of those "prevailing rate employees" who negotiated over pay prior to August 19, 1972. *See* Pub. L. No. 95-454, § 704, 92 Stat. 1111, 1218 (1978), *reprinted at* 5 U.S.C. § 5343 note. *See generally* 5 U.S.C. §§ 5342 *et seq.* (Prevailing Rate Act of 1972). Section 704(a) of the provision refers to "terms and conditions of employment and other employment benefits"; subsection (b) refers to the "pay and pay practices" of prevailing rate employees. *See* Pub. L. No. 95-454, § 704, 92 Stat. 1111, 1218 (1978), *reprinted at* 5 U.S.C. § 5343 note. Congress therefore knows how to grant federal employees the express right to bargain collectively over their pay when it wishes to do so. *See also* Pub. L. No. 92-392, § 9(b), 86 Stat. 564, 574 *reprinted at* 5 U.S.C. § 5343 note (Prevailing Rate Act of 1972) (referring to "wages, the terms and conditions of employment, and other employment benefits"); Pub. L. No. 91-375, § 10(a), 84 Stat. 719, 784

(1970), *reprinted at* 39 U.S.C. § 1201 note (Postal Reorganization Act) (requiring the Postmaster General and labor organizations to bargain over "wages, hours, and working conditions"). Congress' distinction in § 704 between "pay and pay practices" and "terms and conditions of employment and other employment benefits" is thus an indication of its intent that the statutory term "conditions of employment" does not include employee compensation. *See Sealift*, 836 F.2d at 1420.

We agree with the Third Circuit that the Act's legislative history is also "replete" with indications that Congress did not intend to subject employee compensation to collective bargaining. *Id.* at 1416. As originally proposed in the House of Representatives, the public sector labor relations program required federal agencies and employee organizations to "bargain in a good-faith effort to reach agreement with respect to the terms *and* conditions of employment." H.R. 9094, 95th Cong., 1st Sess. (1977) (emphasis added), *reprinted in Legislative History* at 243. "Conditions of employment" expressly included "pay practices." *Id.* at 244. During committee markup of the bill, Representative Heftel of Hawaii introduced an amendment which also defined the scope of bargaining to include "pay practices." *Legislative History* at 1087-88. When the bill was reported out of committee, however, the scope of the bargaining obligation had been significantly narrowed. As reported and enacted, the duty to bargain extended only to "conditions of employment," and did not expressly include employee compensation. Pub. L. No. 95-454, § 7103, 92 Stat. 1111, 1194 (1978), *codified at* 5 U.S.C. §§ 7103(a)(12) & 7103(a)(14). "Few principles of statutory interpretation are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). We therefore refuse

to imply a bargaining obligation specifically rejected by Congress.

Moreover, the House Committee on Post Office and Civil Service, to which the bill was referred, stated in its report that the public sector labor relations program "does not authorize collective bargaining on substantive issues of pay and fringe benefits." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 5 (1978), *reprinted in Legislative History* at 681. In supplemental views to the House Report, several committee members stated that "[t]hose of our colleagues who are concerned that this bill will significantly expand the collective bargaining rights of Federal employees need not worry. It does not." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 377 (1978), *reprinted in Legislative History* at 721. The authors of these supplemental views were expressing their disappointment that the scope of bargaining was narrowly defined in the committee bill and excluded "pay and major money-related fringe benefits from the bargaining table." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 378 (1978), *reprinted in Legislative History* at 722. Similarly, the Senate Committee on Governmental Affairs recognized that Title VII excluded bargaining on "economic matters." S. Rep. No. 95-969, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2735, *and in Legislative History* at 750.

Furthermore, Representative Clay of Missouri, a member of the Committee on Post Office and Civil Service, assured his colleagues that there was "nothing in this bill which allows Federal employees the right . . . to negotiate over pay and money-related fringe benefits." 124 Cong. Rec. H8,466 (daily ed. Aug. 11, 1978), *reprinted in Legislative History* at 853. *See also* 124 Cong. Rec. E4,510 (daily ed. Aug. 10, 1978) (remarks of Rep. Clay) (the committee markup bill contained "no provision for the negotiation of pay and other money related fringe benefits"), *reprinted in Legislative History* at 845; 124 Cong.

Rec. E4,293 (daily ed. Aug. 3, 1978) (remarks of Rep. Clay) ("employees still . . . cannot bargain over pay"), *reprinted in Legislative History* at 839. Representative Derwinski of Illinois remarked that wages "would remain beyond the scope of collective bargaining." 124 Cong. Rec. H9,639 (daily ed. Sept. 13, 1978), *reprinted in Legislative History* at 935. *See also* 124 Cong. Rec. H9,669 (daily ed. Sept. 13, 1978) (remarks of Rep. Fisher of Virginia) (the bill "does not contain such controversial features as the right to . . . bargain for pay and benefits"), *reprinted in Legislative History* at 964. Likewise, Senator Sasser of Tennessee, a member of the Committee on Governmental Affairs, recognized that under the proposed legislation federal employees "may not bargain over pay or fringe benefits." 124 Cong. Rec. S14,281 (daily ed. Aug. 24, 1978), *reprinted in Legislative History* at 1014.

Significantly, Representative Udall of Arizona, who sponsored the amended version of Title VII which Congress ultimately enacted into law, stated that "[t]here is not really any argument in this bill or in this title about Federal collective bargaining for wages and fringe benefits and retirement. . . . All these major regulations about wages and hours and retirement and benefits will continue to be established by law through Congressional action." 124 Cong. Rec. H9,633 (daily ed. Sept. 13, 1978), *reprinted in Legislative History* at 923. His remarks, as those of the amendment's sponsor, are an "authoritative guide" to its construction, *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 526-27 (1982), and illustrate that Title VII does "not permit bargaining over pay and fringe benefits." 124 Cong. Rec. H8,462 (daily ed. Aug. 11, 1978) (remarks of Rep. Udall), *reprinted in Legislative History* at 850. *See generally Sealift*, 836 F.2d at 1417-19.

While the Authority contends that the legislative history is "ambiguous," we think it could not be more clear.

The legislative history of the Act indicates that the term "conditions of employment" does not include employee compensation and that employee compensation therefore falls outside Title VII's duty to bargain.

We recognize, of course, that the FLRA is entitled to deference when applying the provisions of the Civil Service Reform Act, *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983), but we must determine whether the agency's interpretation of the statute comports with congressional intent. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). *See also* 5 U.S.C. § 706 ("reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions"). Congress' intent "is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. Here, the relevant statutory provisions of the Act must therefore "get their final meaning from judicial construction." *See Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), *citing Federal Trade Commission v. R. F. Keppel & Bros., Inc.*, 291 U.S. 304, 314 (1934). In this regard, it would be reckless for a federal court to impute to Congress an unexpressed intention to allow others to reorder the priorities and limitations placed upon federal agencies by Congress itself. Historically, Congress and the Chief Executive have borne primary responsibility for the federal budgetary process. To follow the interpretation of the FLRA in this instance is to effect a judicial withdrawal of political accountability in public-sector compensation that substitutes for the competitive pressures constraining private-sector collective bargaining.

We believe the FLRA has misconstrued Title VII and undermined Congress' intent by ordering the NRC to bargain over employee wages and salaries. Employee compensation is nonnegotiable in the absence of express congressional authorization to the contrary.

III.

Regardless of whether employee compensation is within the scope of Title VII's bargaining obligation, the NRC contends that it cannot be required to negotiate over the union's salary proposal. The NRC asserts that such a duty to bargain would interfere with the agency's right to determine its own budget under Title VII's management rights clause, *see* 5 U.S.C. § 7106(a)(1), and would be inconsistent with § 161(d) of the Atomic Energy Act. *See* 42 U.S.C. § 2201(d). These contentions present persuasive alternative grounds for denying enforcement of the FLRA order.

Our concurring brother believes that it is unnecessary to reach these alternative grounds of decision. We, however, believe that it is proper to address them because both the FLRA and the panel opinion relied upon them and because they were briefed and argued at length before this court.

A.

The undeniable aim of Congress to prescribe in Title VII the rights of federal employees was not meant to come at the expense of an "effective and efficient Government." 5 U.S.C. § 7101(b). Congress therefore used broad and emphatic language in § 7106 in an attempt to strengthen the management power of federal agencies. *See Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 92; *National Treasury Employees Union v. FLRA*, 691 F.2d 553, 560 (D.C. Cir. 1982). Title VII included a "broad statement of management rights," H.R. Rep. No. 95-1403, 95th Cong, 2d Sess. 12 (1978), *reprinted in Legislative History* at 682, in which Congress "specifie[d] areas for decision which are reserved to the President and heads of agencies, which are not subject to the collective bargaining process." S. Rep. No. 95-969, 95th Cong., 2d Sess. 12-13, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2734, *and in Legislative History* at

749-50. In addition to granting federal employees "greater rights in labor relations," 124 Cong. Rec. H8,462 (daily ed. Aug. 11, 1978) (remarks of Rep. Udall), *reprinted in Legislative History* at 850, Title VII also gave management "the power to manage and the flexibility it needs." 124 Cong. Rec. H9,633 (daily ed. Sept. 13, 1978) (remarks of Rep. Udall), *reprinted in Legislative History* at 923.

With certain exceptions not relevant here, an agency therefore "may not bargain away" its authority to make decisions in those areas specified in § 7106(a)(1), including its authority to determine the agency's budget. *See* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 43 (1978), *reprinted in Legislative History* at 689. Although Title VII imposes a broad duty to bargain, it also demarcates an area of management prerogative which Congress protected in order "to preserve the Federal Government's ability to operate in an effective and efficient manner." *National Treasury Employees Union*, 691 F.2d at 560. Congress expressly recognized the paramount importance of an agency's right to determine its budget, 5 U.S.C. § 7106(a)(1), and designated it a matter on which an agency and an employee organization "may not negotiate under any circumstances." H. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 153, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 2887, *and in Legislative History* at 821. *See also* 124 Cong. Rec. S14,271 (daily ed. Aug. 24, 1978) (remarks of Sen. Percy), *reprinted in Legislative History* at 1012 (agency budgets are "specifically excluded from the scope of bargaining"). The management rights clause provides that "nothing in this chapter shall affect the authority of any management official of any agency" to exercise certain management prerogatives, including the authority to determine the agency's budget. 5 U.S.C. § 7106(a)(1). Because the union's salary proposal would interfere with this prerogative, it is perforce nonnegotiable.

Here, the FLRA contends that the union's salary proposal does not violate the management rights clause because the proposal does not prescribe a specific dollar amount to be allocated in the NRC's budget. According to the FLRA, the union's proposal "merely establishes a formula for adjusting [employee] salaries" and is therefore within the NRC's duty to bargain. We reject this argument. Although the union's salary proposal does not prescribe a specific dollar amount, it does provide a formula which ultimately will dictate a specific dollar amount to be allocated in the NRC's budget each time the Advisory Committee on Federal Pay recommends a cost-of-living adjustment to Congress and the President.

Moreover, if the union's salary proposal becomes part of the collective bargaining agreement, it will divest the NRC of budget-making authority and transfer that authority to the Advisory Committee on Federal Pay. The union's salary proposal would thus clearly "affect" the NRC's authority to determine its own budget and is therefore nonnegotiable. *See* 5 U.S.C. § 7106(a)(1). Specifically, the NRC would be obligated to negotiate in good faith over the union's salary proposal if it is a subject of mandatory bargaining. Title VII provides for binding resolution of contract disputes and the proposal may well become a provision of the collective bargaining agreement over the agency's objection. *See* 5 U.S.C. §§ 7119(b), 7119(c)(5)(B) & 7119(c)(5)(C). As such, the NRC would be obligated to adjust its employees' wages and salaries each time the Advisory Committee on Federal Pay recommends a general increase in federal salaries. Significantly, such salary adjustments would not be subject either to the views of the agency or the actions of Congress because, by its terms, the proposal's automatic salary adjustments would be "unaffected by Presidential or Congressional actions."

This result would significantly affect the NRC's operations. Salaries, and benefits based upon those salaries,

constitute more than forty percent of the NRC's annual budget. The union's proposal would vest a third-party with absolute authority to determine salary increases and would require the NRC to somehow absorb unfunded millions of dollars in salary adjustments. While the FLRA contends that the agency has failed to demonstrate that the anticipated increase in costs is significant and not offset by compensating benefits, nothing in the statute requires that this showing be made to the satisfaction of the FLRA. As applied to employee compensation, the FLRA's test makes itself, not the agency, the arbiter of the agency's budget. Congress, however, has vested the NRC with the responsibility of balancing employee compensation against the agency's other goals. Congress did not vest this authority either in the FLRA or the Advisory Committee on Federal Pay. Title VII of the Act is quite specific: "*nothing* in this chapter shall *affect*" an agency's authority to make budget determinations. 5 U.S.C. § 7106(a)(1) (emphasis added). The union's salary proposal would divest the NRC of substantive decisionmaking authority over its budget and is therefore nonnegotiable pursuant to Title VII's management rights clause.

B.

Finally, Title VII of the Act further restricts an agency's duty to bargain by precluding negotiations over contract proposals which are "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. § 7117(a)(1). Here, the union's salary proposal conflicts with § 161(d) of the Atomic Energy Act (AEA); it is therefore nonnegotiable.

In the performance of its functions, the NRC is authorized by § 161(d) of the AEA to:

> appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission. Such officers and employees

> shall be appointed in accordance with the civil-service laws and their compensation fixed in accordance with [the Classification Act of 1949], except that, to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws. . . .

42 U.S.C. § 2201(d). Pursuant to this statutory provision, the NRC elected in 1975 to exempt its employees from the general requirements of the Classification Act. The FLRA contends that this election now provides the NRC with virtually unlimited discretion over the salaries and wages of NRC employees. The FLRA found that requiring the NRC to bargain over the union's salary proposal would not be inconsistent with § 161(d).

Again we disagree. Nothing in § 161(d) requires the NRC to bargain over wages or renders inapplicable those sections of the Civil Service Reform Act which define the scope of an agency's bargaining obligation. At most, § 161(d) is a limited grant of authority to the NRC designed to attract individuals whose talents and expertise would assist the agency in the performance of its mission. *See* 42 U.S.C. § 2201(d). Section 161(d) and the NRC's 1975 decision to opt out of the Classification Act scheme do not provide the agency with unfettered discretion to negotiate over employee compensation. The AEA specifically limits the NRC's discretion and the agency may deviate from the general civil service laws only "to the extent the Commission deems such action necessary to the discharge of its responsibilities." 42 U.S.C. § 2201(d). The NRC has never made the requisite determination that it is necessary to depart significantly from general government pay rates. To the contrary, the NRC's present compensation scheme closely parallels that found in the Classification Act. Nothing in the statute supports the Authority's conclusion that once the NRC decides some deviation from the Classification Act is required,

that the agency thereby becomes obligated to negotiate broadly over pay schedules.

If the union's salary proposal becomes binding on the NRC, *see* 5 U.S.C. §§ 7119(b), 7119(c)(5)(B) & 7119(c)(5)(C), the agency may be required to compensate its employees at levels above which it believes are necessary to the discharge of its duties. The agency's implementation of its statutory obligations would in fact be significantly restricted, for the salary proposal would vest in the Advisory Committee on Federal Pay the agency's right to determine whether wage costs are justified by corresponding benefits. Thus, under the FLRA's interpretation of § 161(d), what Congress intended as a provision to grant the NRC marginally greater discretion would actually leave the agency with less discretion in the exercise of its responsibilities. Such a result would be contrary to a plain reading of § 161(d), *see* 42 U.S.C. § 2201(d), and Title VII of the Act expressly excludes matters from collective bargaining which are inconsistent with federal law. *See* 5 U.S.C. § 7117(a).

In reviewing the NRC's enabling act, we are not bound by the FLRA's construction of the statute. *See Department of the Treasury, Bureau of Engraving & Printing v. FLRA*, 838 F.2d 1341, 1342 n.* (D.C. Cir. 1988). We may engage in *de novo* review of the FLRA's interpretation of another agency's enabling act, and, in this case, we defer to the NRC's "permissible construction" of the AEA. *See Chevron*, 467 U.S. at 843. According to the NRC, it may not depart from general government pay rates until it determines that such a departure is necessary to the discharge of its responsibilities. No such determination has been made here and the union's salary proposal is therefore nonnegotiable.

IV.

In sum, we hold that employee compensation is not a "condition of employment" as defined by Congress in 5

U.S.C. § 7103(a)(14). Moreover, the union's salary proposal is "inconsistent" with federal law, *see* 42 U.S.C. § 2201(d), interferes with the NRC's authority to determine its budget, and is therefore nonnegotiable. *See* 5 U.S.C. §§ 7106(a)(1) & 7117(a)(1). We grant the NRC's petition for review, reverse the decision of the FLRA, and deny enforcement of the FLRA's bargaining order.

ENFORCEMENT DENIED.

HALL, Circuit Judge, concurring:

Judge Wilkinson has demonstrated persuasively in Sections I and II of his opinion that absent an express congressional mandate to the contrary, matters of employee compensation are not, and were never intended to be, negotiable under the Civil Service Reform Act. Accordingly, I join in these portions of the opinion and concur in the denial of enforcement of the FLRA's bargaining order.

However, I cannot join in Section III of the opinion which discusses alternative grounds for reversing the FLRA, namely the budgetary rights issue under § 7106(a)(1) of the Civil Service Reform Act and the possible conflict between the union's salary proposal and § 161(d) of the Atomic Energy Act. My decision to not join in this portion of the opinion in no way reflects my views on the merits of these issues. Rather, because our determination that matters are nonnegotiable conclusively resolves the dispute in this case, I see no need to reach these other issues.

PHILLIPS, Circuit Judge, dissenting:

For reasons sufficiently given in the superseded panel opinion, 859 F.2d 302, and in the decisions in accord of the Second Circuit in *West Point Elementary School*

Teachers Ass'n v. FLRA, 855 F.2d 936 (2d Cir. 1988), and the Eleventh Circuit in *Fort Stewart Schools v. FLRA*, 860 F.2d 396 (11th Cir. 1988), I respectfully would dissent and would enforce the FLRA's bargaining order.

Chief Judge Ervin, Judge Murnaghan and Judge Sprouse have asked to be shown as joining in this dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 87-3182

NUCLEAR REGULATORY COMMISSION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor.

Argued May 5, 1988

Decided Oct. 5, 1988

Dennis C. Dambly, Deputy Asst. Gen. Counsel for Admin. (William H. Briggs, Jr., Sol., E. Leo Slaggie, Deputy Sol., Marvin L. Itzkowitz, Sr. Counsel for Labor and Personnel, Mary K. Hembree, Office of the Gen. Counsel, U.S. Nuclear Regulatory Com'n, Washington, D.C., on brief), for petitioner.

Jill A. Griffin (Ruth E. Peters, Sol., William E. Persina, Deputy Sol., Federal Labor Relations Authority, Washington, D.C., on brief), for respondent.

Gregory O'Duden, Deputy Director of Litigation (Lois G. Williams, Director of Litigation, National Treasury Employees Union, Washington, D.C., on brief), for intervenor.

Before PHILLIPS and SPROUSE, Circuit Judges, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

JAMES DICKSON PHILLIPS, Circuit Judge:

The Nuclear Regulatory Commission (NRC) is before this court on a petition for review of a bargaining order of the Federal Labor Relations Authority (FLRA). The FLRA has cross-petitioned for enforcement of its order and the National Treasury Employee's Union (NTEU) has been permitted to intervene. We have jurisdiction over the NRC's petition for review and the FLRA's cross-petition for enforcement under §7123 of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 7123 (1982). In its order, the FLRA found that the NRC was obligated under 5 U.S.C. § 7102(2) to bargain in good faith over a salary proposal advanced by the NTEU during collective bargaining. We agree. Accordingly, we deny the petition for review, affirm the decision of the FLRA, and grant the cross-petition for enforcement of the FLRA's bargaining order.

I

The NTEU is the exclusive representative of all nonmanagerial, nonsupervisory, and nonconfidential professional, nonprofessional and wage-grade employees of the NRC. In October 1984, during collective bargaining, the NTEU presented the following proposal to the NRC:

> Section 52.1
>
> The salary structure, that is the grade and steps of the pay schedule, being used by the NRC will be maintained. Hereafter, all employees will have their current salaries adjusted for the cost of living/comparability factor. The adjustment will be equal to

the statistical adjustment recommended to the President by the Pay Advisory Council.[1]

This adjustment will become effective at the beginning of the first pay period following the announcement of it by the Council or other appropriate sources. It will be unaffected by Presidential or Congressional actions.

Section 52.2

NTEU agrees to establish with the employer a productivity committee that will monitor the impact of the new salary adjustment system and seek reasonable ways to increase the productivity of the employer, e.g., decrease employee turnover, remove work obstacles, improve upon available machines and procedures, and raise employee morale.

The NRC refused to bargain and served the NTEU with a written allegation of nonnegotiability, *see* 5 U.S.C. § 7117(c), on October 5, 1985. The NTEU, however, did not until February 25, 1986, formally request a written allegation of nonnegotiability regarding the proposal which the NRC then again provided the NTEU on March 6, 1986. On March 20, 1986, the NTEU filed a petition for review of the NRC's nonnegotiability determination, pursuant to 5 U.S.C. § 7117.

Before the FLRA, the NRC asserted several grounds for its refusal to bargain over the NTEU's proposal. First, the NRC argued that the NTEU's petition for review was untimely under 5 U.S.C. § 7117(c) because that provision required the petition for review to be filed within 15 days of the NRC's original written allegation of nonnegotiability.

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[1] The FLRA concluded and the parties agree that by "Pay Advisory Council" the proposal is referring to the Advisory Committee on Federal Pay, functioning pursuant to 5 U.S.C. § 5306.

On the merits, the NRC argued that the NTEU's proposal is nonnegotiable because it is "inconsistent with Federal law," 5 U.S.C. § 7117(a), namely with § 161(d) of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § 2201(d), which, in pertinent part, provides that the NRC's employees' compensation is to be

> fixed in accordance with [the Classification Act of 1949, as amended] chapter 51 and subchapter III of chapter 53 of Title 5, except that, to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws.

Id. Alternatively, the NRC contended that Congress never intended federal employees wages to be negotiable "conditions of employment" under §§ 7102(2) and 7103(a)(14) of the CSRA and that such matters are, generally, nonnegotiable "unless a given statute clearly indicates to the contrary." The absence of such a statute with regard to the NRC's employees, it was argued, rendered their salaries nonnegotiable under the general rule. Finally, the NRC contended that the NTEU's proposal conflicted with the NRC's "management right" to determine its budget, a right protected by § 7106(a)(1) of the CSRA, 5 U.S.C. § 7106(a)(1), and was not therefore properly the subject of collective bargaining.

The FLRA found that the NTEU's petition for review was timely, rejected each of the NRC's substantive objections to the proposal's negotiability, and ordered that the NRC bargain over the NTEU's proposal. This petition and cross-petition for review followed.

II

As a preliminary matter, it is necessary to address the NRC's reiterated assertion that the NTEU's petition for

review before the FLRA was untimely. Section 7117(c) of the CSRA, 5 U.S.C. § 7117(c)(1) and (2) provides:

> (c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.
>
> (2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—
>
> (A) filing a petition with the Authority; and
>
> (B) furnishing a copy of the petition to the head of the agency.

Pursuant to its rulemaking power under § 7134 of the CSRA, the FLRA promulgated the following regulation, implementing the § 7117(c) time limits.

> The time limit for filing a petition for review is fifteen (15) days after the date the agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained is served on the exclusive representative. The exclusive representative shall request such allegation in writing and the agency shall make the allegation in writing and serve a copy on the exclusive representative: *Provided, however,* That review of a negotiability issue may be requested by an exclusive representative under this subpart without a prior written allegation by the agency if the agency has not served such allegation upon the exclusive representative within ten (10) days after the date of the receipt by any agency bargaining representative at the negotiations of a written request for such allegation.

5 C.F.R. § 2424.3 (1980). The FLRA has interpreted both § 7117(c) and § 2424.3 as providing that only an allegation of nonnegotiability tendered in response to a written request for such allegation starts the clock running on the fifteen day period for filing a petition for review with the FLRA. The NRC argues that this interpretation directly conflicts with § 7117(c) and should therefore be overturned. We disagree.

A

It is by now well established that the FLRA is "entitled to considerable deference when it exercises its 'special function of applying the general provisions of the [Civil Service Reform] Act to the complexities' of federal labor relations." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97, 104 S.Ct. 439, 444, 78 L.Ed.2d 195 (1983) (*BATF*) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236, 83 S.Ct. 1139, 1150, 10 L.Ed.2d 308 (1963). Equally clear is the principle that "while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling act . . . they must not 'rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" 464 U.S. at 97, 104 S.Ct. at 444 (citations omitted). Nevertheless, this court must sustain the FLRA's order unless it is "arbitrary, capricious, an abuse of discretion, or otherwise unlawful." *American Fed'n of Gov't Employees, AFL-CIO, Local 2303 v. FLRA*, 815 F.2d 718, 719 (D.C. Cir.1987); *see* 5 U.S.C. § 706.

B

Guided by the foregoing principles we find the FLRA's interpretation of § 7117(c) to be eminently reasonable. Section 7117(c) merely indicates that an agency may "allege" that a given matter is not the proper subject of collective bargaining and that within fifteen days after

the "allegation" is made, an appeal may be instituted. The FLRA's implementing regulation, § 2424.3, and case interpretation of the statute, *see American Fed'n of Gov't Employees, AFL-CIO, Local 3385 and Fed. Home Loan Bank Bd., Dist. 7*, 7 F.L.R.A. 398 (1981), and the regulation merely flesh out the definition of "allegation" in a manner consistent with the statutory purpose. If the NRC's interpretation of "allegation" were to be accepted, mere statements regarding negotiability made during collective bargaining might force a union to institute review proceedings in order to preserve its right to review. The FLRA persuasively argues that this would be inconsistent with the statute's policy of facilitating collective bargaining. An exclusive representative would repeatedly be forced to institute review proceedings prior to determining whether a given proposal was worth fighting for as written or could be amended to meet both the union's and the agency's needs. The FLRA has permissibly construed § 7117(c) as providing that the triggering of the formal review process is best left in the hands of the union if the collective bargaining process is not to be broken down in a "fruitless cycle of agency objection and appeal." *Local 2303*, 815 F.2d at 722. We therefore decline to overturn the FLRA's interpretation of § 7117(c). *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) (*Chevron*).

III

Turning now to the merits of the NRC's petition for review, we address in order, the NRC's contentions that the NTEU's proposal is nonnegotiable as "inconsistent with federal law"; as excluded from the "conditions of employment" over which an agency is required to negotiate; and as an infringement on the NRC's right to determine its budget.

A

Section 7102 of the CSRA gives federal employees the right to unionize and engage in collective bargaining with respect to "conditions of employment." 5 U.S.C. § 7102. Both federal agencies and labor organizations are required, under the CSRA, to bargain in good faith over the "conditions of employment" unless the statute otherwise exempts them from the obligation. *See* 5 U.S.C. §§ 7102, 7103(a)(14), 7114, 7116(a)(5) and (b)(5), 7117. One such exemption is contained in § 7117 of the CSRA which the parties agree prohibits bargaining over union proposals where to do so would be "inconsistent with federal law." [2]

The NRC argues that bargaining over the NTEU's proposal would be inconsistent with § 161(d) of the AEA, 42 U.S.C. § 2201(d), which in relevant part provides:

> In the performance of its functions the Commission is authorized to—
>
> d. appoint and fix the compensation of such officers and employees as may be necessary to carry out the

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[2] Section 7117, in relevant part, provides:

> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.
>
> (2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

5 U.S.C. § 7117(a)(1) and (2).

> functions of the Commission. Such officers and employees shall be appointed in accordance with civil-service laws and their compensation fixed in accordance with . . . [the Classification Act of 1949, as amended] except that, to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws . . . .[3]

The NRC admits that in 1975, upon its creation as a successor to the Atomic Energy Commission (AEC), it informed the Civil Service Commission of its election, pursuant to § 161(d), to continue the AEC's practice of exempting all positions within the agency from the requirements of the civil service laws and the Classification Act. However, the NRC argues that "by generally exempting its positions from the Classification Act of 1949, as amended, the [NRC] did not make the finding required by section 161(d) to enable it to deviate from the general civil service pay schedule." In other words, the NRC interprets § 161(d) as providing that "no discretion to depart from General Schedule pay rates is allowed until the Commission makes a finding that the departure is necessary to the discharge of its responsibilities and then

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[3] The Classification Act of 1949 is now referenced in the statute as "chapter 51 and subchapter III of chapter 53 of Title 5." Section 161(d) further provides:

> *Provided, however,* That no officer or employee (except such officers and employees whose compensation is fixed by law, and scientific and technical personnel up to a limit of the highest rate of grade 18 of the General Schedule) whose position would be subject to [the Classification Act of 1949, as amended], if such [Act] were applicable to such position, shall be paid a salary at a rate in excess of the rate payable under such [Act] for positions of equivalent difficulty or responsibility . . . .

42 U.S.C. § 2201(d). The FLRA found and the parties agree that the legal limits imposed on NRC employees' salaries in this portion of § 161(d) are not relevant to the present appeal because the proposal is to be construed as limited consistent with the statutory constraints.

such departure can only be to the extent necessary to discharge its responsibilities." Considering its discretion over its employees' salaries to be so limited by Congressional directive, the NRC argues that the duty to bargain over the NTEU's salary proposal would be inconsistent with § 161(d).

The FLRA rejected the NRC's interpretation of § 161(d), and found instead that the language in § 161(d) relied upon by the NRC in finding its discretion congressionally circumscribed actually places no specific limit on the NRC's discretion to bargain over the NTEU's proposal. The FLRA then held that the unlimited discretion over the NRC employee's wages and salaries vested in the NRC as a result of its exemption election carries with it the duty to bargain in good faith over the NTEU's salary proposal. In short, the FLRA interprets § 161(d) as only placing limits on the NRC's discretion to exempt its positions from the civil service laws and Classification Act. Once the election is made, as here it concededly has been, the FLRA considers the NRC to be left with unbridled discretion over its employees' wages and salaries.[4]

Although, in resolving this conflict over the proper interpretation of § 161(d), we are mindful that considerable deference is due the construction which the NRC has placed on its enabling act, the Atomic Energy Act, *see* 42 U.S.C. § 2201, we find the NRC's interpretation to be an unreasonable construction of § 161(d) and flatly contrary to that section's plain language. The FLRA's interpretation on the other hand, while not entitled to equal deference, *compare Shanty Town Assoc. Ltd. v. EPA*, 843 F.2d 782, 790 n. 12 (4th Cir.1988) (holding that court is not required to defer to agency's interpretation of enabling acts other than its own) *with United States Dept. of*

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[4] Again, the parties agree that the NTEU's salary proposal is to be construed consistently with the legal limits § 161(d) places on NRC employees' salaries. These legal limits are not, therefore, viewed as limits on the NRC's discretion.

Health & Human Services v. FLRA, 833 F.2d 1129, 1135 (4th Cir.1987) (holding that FLRA interpretations of statutes other than CSRA are entitled to deference where "interpretation bears directly on the 'complexities' of federal labor relations"), is in accord with the plain language of § 161(d). Section 161(d) clearly gives the NRC the authority to exempt its positions from the civil service laws and the Classification Act "to the extent necessary to the discharge of its responsibilities." This clause cannot be read to limit the NRC's discretion over its employees' pay once the decision to exempt has been effectuated. The NRC offers no legislative history, and we know of none, to the contrary. As the final arbiter of issues of statutory construction, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385, 85 S.Ct. 1035, 1043, 13 L.Ed.2d 904 (1965), we cannot give effect to an agency's interpretation of a statute that is "manifestly contrary" to that statute's plain language. *See Chevron*, 467 U.S. at 843-45, 104 S.Ct. at 2781-83.

In urging this court to find the NTEU's proposal inconsistent with § 161(d), the NRC relies heavily on the Third Circuit's recent decision in *Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409 (1988) (*Sealift*). There, the court held that proposals relating to the pay of civilian mariners were nonnegotiable because the mariners' positions were governed by the Prevailing Rate Act, 5 U.S.C. § 5348(a) (1982), which, in relevant part, provides that their pay "shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry." The court reasoned that bargaining over pay related proposals would be inconsistent with the congressional directive that the Navy assess and resolve competing public interest concerns prior to adjusting the mariners' pay. 836 F.2d at 1415-17. The FLRA correctly contends that the Third Circuit's resolution of the statutory conflict in

Sealift has no bearing on the present appeal. Not only are the NRC's employees not governed by the Prevailing Rate Act, but the language of § 161(d), as we have already held, places no limit on the NRC's bargaining discretion similar to that before the court in *Sealift*.[5] We therefore uphold the FLRA's finding that the NRC is not exempted from its duty to bargain in good faith over the NTEU's proposals by virtue of any inconsistency of this duty with § 161(d) of the Atomic Energy Act.

B

Again relying on *Sealift*, the NRC offers an alternative ground for finding the FLRA's bargaining order unenforceable as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982) (stating standard of review of FLRA order). The *Sealift* court, having already sufficiently concluded that bargaining over the relevant pay related proposal was inconsistent with § 5348(a) of the Prevailing Rate Act, and therefore nonnegotiable under § 7117 of the CSRA, went on to hold that unless a federal statute specifically provides to the contrary, the wages and salaries of federal employees are nonnegotiable. *See* 836 F.2d at 1419. With respect, we disagree.

Again, § 7102 of the CSRA obligates the NRC to bargain with the NTEU with respect to "conditions of employment," 5 U.S.C. § 7102, that are not exempted from the bargaining process under § 7117. Congress defined "conditions of employment" as:

> (14) . . . personnel policies, practices, and matters, whether established by rule, regulation, or otherwise,

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[5] The D.C. Circuit's recent decision, adopting the Third Circuit's reasoning in *Sealift*, is similarly distinguishable. *See Department of the Treasury, Bureau of Engraving and Printing v. FLRA*, 838 F.2d 1341, 1342-43 (D.C.Cir. 1988).

> affecting working conditions, except that such term does not include policies, practices, and matters—
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or
>
> (C) to the extent such matters are specifically provided for by Federal statute.

5 U.S.C. § 7103(a)(14). While recognizing that the wages and fringe benefits of most federal employees are "specifically provided for by Federal statute," the FLRA has held that:

> [T]he definition of the scope of bargaining which is embodied in the [CSRA] is perfectly clear. Under that definition, and consistent with practice under the Executive Order, substantive proposals regarding pay and fringe benefits which are not specifically provided for by Federal Statute, and any other conditions of employment are negotiable to the extent they are not inconsistent with applicable laws, rules and regulations if the matters proposed are within an agency's discretion . . . . Ambiguous legislative history does not compel a different conclusion.[6]

American Fed'n of Gov't Employees, AFL-CIO, Local 1897 and Dept. of the Air Force, Eglin Air Force Base, Florida, 24 F.L.R.A. 377, 383 (1986) (citations omitted) (*Eglin*). The FLRA applied its holding in *Eglin* to the NRC's and NTEU's dispute and found sufficient discre-

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[6] Prior to enactment of CSRA, federal employment matters were governed by Executive Orders. *See BATF v. FLRA*, 464 U.S. 89, 91, 104 S.Ct. 439, 441, 78 L.Ed.2d 195 (1983). Under this regime, the FLRA's predecessor, the Federal Labor Relations Council found pay matters to be negotiable unless provided for by law or in conflict with an agency rule or regulation. *See Eglin*, 24 F.L.R.A. at 381.

tion in the NRC over its employees' salaries to mandate bargaining.

We consider the FLRA's interpretation of the CSRA and its legislative history to be a wholly "reasonable accommodation of conflicting policies that were committed to its care by the [CSRA]." *Shanty Town Assoc. Ltd. v. EPA*, 843 F.2d 782, 790 (4th Cir.1988). "[W]e are not at liberty to reject it merely because we might have reached a different conclusion if confronted with the issue in the first instance." *Id.* (citing *Chevron*, 467 U.S. at 843-44 & n. 11, 104 S.Ct. at 2781-82 & n. 11). This court has consistently recognized the special deference due the FLRA's exercise of its " 'special function of applying the general provisions of the [CSRA] to the complexities' of federal labor relations." *United States Dept. of Health and Human Services v. FLRA*, 833 F.2d 1129, 1135 (4th Cir.1987) (quoting *BATF*, 464 U.S. at 97, 104 S.Ct. at 444).

Faced with this same issue of whether federal employee pay related proposals are negotiable under the CSRA, a panel of this court recently unanimously held that a federal agency has "a general duty under 5 U.S.C. § 7117(a) to bargain in good faith over the wages of its employees" provided that the employees' pay is not specifically provided for by statute and the proposal is not otherwise exempt from negotiation under § 7117. *United States Dept. of Defense Dependent Schools, Fort Bragg, North Carolina v. FLRA*, No. 87-3061, slip op. at 4 (4th Cir. Feb. 3, 1988) (initially published at 838 F.2d 129) (Murnaghan, J., dissenting on other grounds). The panel opinion, during the pendency of the present appeal was, however, vacated as moot, *see* 838 F.2d 129, 130-38 (4th Cir.1988), and we must, therefore, address this issue anew. Although the panel opinion in *Fort Bragg* is not binding on us, we find the reasoning expressed therein persuasive. *See Fort Bragg*, slip op. at 13-15 (Murnaghan, J., dissenting on other grounds).

As the FLRA held in the present case, and as was noted in *Fort Bragg*, *id.*, the argument that Congress did not intend federal employee wages to be negotiable as conditions of employment is based on a few isolated and ambiguous statements in the CSRA's legislative history. In particular, the NRC points out that Congressman Udall, one of the bill's chief sponsors, stated that "regulations about wages and hours . . . will continue to be established by law through congressional action." 124 Cong.Rec. H9633 (daily ed. Sept. 13, 1978). Congressman Clay, another of the CSRA's sponsors, stated that "there is nothing in this bill which allows Federal employees the right to . . . negotiate over pay and money-related fringe benefits." 124 Cong.Rec. H8466 (daily ed. Aug. 11, 1978). In a similar vein, the House Report on the CSRA stated that "Federal pay will continue to be set in accordance with the pay provisions of title 5, and fringe benefits, including retirement, insurance, and leave, will continue to be set by Congress." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 12 (1978). Congressman Clay also stated, in support of the Udall version of Title VII of the CSRA ultimately enacted into law:

> Section 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the committee and retained in the Udall substitute with the clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection. Thus, where a statute merely vests authority over a particular subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment.

124 Cong.Rec. H9638 (daily ed. Sept. 13, 1978).

The legislative history of Title VII of the CSRA is clearly ambiguous, as the FLRA has concluded, on the

matter of negotiability of federal employee pay-related proposals. Faced with the ambiguous remarks of the CSRA's sponsors, which on the one hand suggest that pay is generally nonnegotiable but on the other suggest that pay is negotiable if not specifically provided for by law, the FLRA reasonably concluded that the plain language of the CSRA, in light of the Act's policy of encouraging collective bargaining, indicated a Congressional intent that wages, as "matters . . . affecting working conditions," 5 U.S.C. § 7103(a)(14), be generally negotiable if not otherwise exempted from negotiation under sections 7103 and 7117.[7] "An ambiguous legislative history . . . will not suffice to displace the FLRA's reasonable construction of the Act's language." *American Fed'n of Gov't Employees, Locals 225, 1504, and 3723, AFL-CIO v. FLRA*, 712 F.2d 640, 649 (D.C.Cir.1983). We therefore affirm the FLRA's conclusion that the NRC, vested as it is under § 161(d) with discretion over its employees' wages, has a general duty to bargain over pay-related proposals.

C

The NRC finally argues that the NTEU's proposal interferes with its management right to determine its own budget and is therefore properly considered nonnegotiable under 5 U.S.C. § 7106(a)(1). Section 7106 in relevant part provides:

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[7] The NRC argues that the use of the single phrase "conditions of employment" in the CSRA indicates that Congress intended to exclude wages from negotiable matter because in § 158(d) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(d) (1982), Congress specified that bargaining was required "with respect to wages, hours and other terms and conditions of employment." Because Congress had the NLRA in mind while drafting the CSRA, the NRC argues, the deletion of "wages" from the defined bargaining duty is significant. Although the Third Circuit agrees with this interpretation of the omission, *see* 836 F.2d at 1416 n.14, we find the import clearly to the contrary. The use of the connecting word "other" in the NLRA suggests that Congress considers wages, among other things, to be conditions of employment.

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
>
> (1) to determine the . . . budget . . . of the agency
>
> . . . .
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating—
>
> . . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section . . . .

5 U.S.C. § 7106. The FLRA, in interpreting § 7106, has held that in order to establish nonnegotiability pursuant to § 7106, either an agency must demonstrate that a given proposal "attempt(s) to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them," or, where a proposal does not so attempt, the agency must "make[] a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits." *American Fed'n of Gov't Employees and Air Force Logistics Command, Wright-Patterson Air Force Base*, 2 F.L.R.A 604, 607-08 (1980) (*Wright-Patterson*).[8]

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[8] The full explanation of the FLRA's development of the *Wright-Patterson* test bears repeating as demonstrative of the reasonableness of the FLRA's interpretation of § 7106:

> There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation. Whether a proposal directly affects the agency's determination of its budget depends upon the definition of "budget" as used in the Statute. The Statute and legislative history do not contain such a definition. In the absence of a clearly stated legislative intent, it is appro-

In the present case, the FLRA ruled that the NTEU's proposal did not attempt to prescribe a specific amount to be allocated on the NRC's budget. Rather, the FLRA reasoned the proposal merely suggested a procedure and ultimately a percentage by which NTEU employee salaries might be adjusted to allow for cost of living increases. Because the NRC retained control of the amount of its budget to be allocated for the salaries, the proposal does not prescribe a specific amount which the NRC must allocate in its budget. In other words, as the FLRA has

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priate to give the term its common or dictionary definition. As defined by the dictionary, "budget" means a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the period and proposals for financing them. In this sense, the agency's authority to determine its budget extends to the determination of the programs and operations which will be included in the estimate of proposed expenditures and the determination of the amounts required to fund them. Under the Statute, therefore, an agency cannot be required to negotiate those particular budgetary determinations. That is, a union proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them would infringe upon the agency's right to determine its budget under section 7106(a)(1) of the Statute.

Moreover, where a proposal which does not by its terms prescribe the particular programs or amounts to be included in an agency's budget, nevertheless is alleged to violate the agency's right to determine its budget because of increased cost, consideration must be given to all the factors involved. That is, rather than basing a determination as to the negotiability of the proposal on increased cost alone, that one factor must be weighed against such factors as the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances, and the like. Only where an agency makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute.

Id. (citations omitted).

elsewhere stated, the proposal "establishes a percentage of the total . . . cost to be absorbed by the Agency. What that percentage means in terms of the amount to be budgeted depends on factors not covered by the proposal, but within the Agency's control." *Eglin*, 24 F.L.R.A. at 386.

While admitting that the NTEU's proposal does not prescribe a specific dollar amount to be allocated in its budget, the NRC argues that the proposal allows a third party, the Advisory Committee on Federal Pay, the authority to determine the salary component of the NRC's budget. This argument does not address the FLRA's conclusion that the proposal merely sets a procedure for adjusting salaries, an item already existing in the NRC's budget and over which the NRC has control. We consider the FLRA's application of § 7106 and the first aspect of the *Wright-Patterson* test to the NTEU's proposal to be a reasonable construction of the CSRA and therefore decline to upset the FLRA's finding in this regard.

The FLRA also analyzed the NTEU's proposal under the second aspect of the *Wright-Patterson* test and held that the NRC had not "made a substantial demonstration that implementation of the proposal will result in a significant, unavoidable increase in costs which is not outweighed by compensating benefits." The FLRA rejected the NRC's contention that the annual cost of living adjustment recommended by the Advisory Committee on Federal Pay,[9] if adopted,[10] would have a substantial un-

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[9] The parties represent that this increase has averaged a rate of approximately 10% since 1982, and has been more on the order of 5% in more recent years.

[10] Under the CSRA, the parties have a duty to negotiate over a bargainable proposal until an impasse is reached. Section 7119 provides for the resolution of such impasse, including ordering parties to agree to the specific proposal, *see Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1499 (D.C.Cir. 1984), by the Federal Service Impasses Panel. 5 U.S.C. § 7119.

avoidable impact on the NRC's ability to determine its budget. The FLRA reasoned that increased cost is only one factor to be considered and that, standing alone, the cost increase that might flow from the NTEU's proposal did not interfere with the NRC's § 7106 budget determination right. Because the NRC failed to even address the issue of compensatory benefits, the FLRA found the NTEU's proposal to be the proper subject of collective bargaining.

We again find the FLRA's construction of § 7106 as applied to the union's proposal to be reasonable. The NRC asks that we construe § 7106 as barring a proposal's negotiability upon a mere showing by an agency of what amounts to less than a five percent increase relative to the agency's total budget.[11] Such a construction of this provision of the CSRA would likely render the vast majority of proposals nonnegotiable. Congress intended, however, that § 7106 " 'be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal.' " *American Fed'n of Gov't Employees, Locals 225, 1504, and 3723, AFL-CIO v. FLRA*, 712 F.2d 640, 649 n. 36 (D.C.Cir.1983) (quoting H.R.Rep. No. 95-1403, 95th Cong., 2d Sess. 44 (1978)). The FLRA, therefore, reasonably concluded that the NRC must show that any anticipated increase in cost was not offset by benefits such as those outlined in *Wright-Patterson*.[12] The NRC having made no such showing, the FLRA properly found § 7106 to present no bar to the NTEU's proposal's negotiability.

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[11] Even were a twenty percent increase recommended in a given year, the worst scenario presented by the NRC in its petition for review, the NRC admits this would amount at most to approximately an eight percent increase in the agency's roughly four hundred million dollar budget.

[12] *See supra* note 8. The NRC appears to argue that this requirement from *Wright-Patterson* is arbitrary and capricious. This issue was not raised before the Commission in the first instance and therefore will not be considered by this court. 5 U.S.C. § 7123(c).

IV

In enacting Title VII of the Civil Service Reform Act, Congress expressed its finding that

> "labor organizations and collective bargaining in the civil service are in the public interest," 5 U.S.C. § 7101(a) (1982 ed.), [and] significantly strengthened the position of public employee unions while carefully preserving the ability of federal managers to maintain "an effective and efficient government," § 7101(b).

BATF, 464 U.S. 89, 92, 104 S.Ct. 439, 441 (1983) (footnote omitted). The CSRA created the FLRA and directed that it " 'provide leadership in establishing policies and guidance relating to matters' arising under the Act." *Id.* at 93, 104 S.Ct. at 442. We find that in applying the CSRA to the present negotiability dispute, the FLRA has properly carried out its function under the Act. Accordingly, we deny the petition for review, affirm the decision of the FLRA, and grant enforcement of the FLRA's bargaining order.

SO ORDERED.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
Washington, D.C.

Case No. 0-NG-1250

NATIONAL TREASURY EMPLOYEES UNION,
Union

and

NUCLEAR REGULATORY COMMISSION,
Agency

DECISION AND ORDER [1]

I. *Statement of the Case*

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of a single proposal. For the reasons which follow, we find that the proposal is within the duty to bargain under the Statute.

II. *Proposal*

Section 52.1

The salary structure, that is the grade and steps of the pay schedule, being used by the NRC will be maintained. Hereafter, all employees will have their current salaries adjusted for the cost of living/comparability factor. The adjustment will be equal

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[1] Chairman Calhoun's dissent follows this opinion.

to the statistical adjustment recommended to the President by the Pay Advisory Council. This adjustment will become effective at the beginning of the first pay period following the announcement of it by the Council or other appropriate sources. It will be unaffected by Presidential or Congressional actions.

Section 52.2

NTEU agrees to establish with the employer a productivity committee that will monitor the impact of the new salary adjustment system and seek reasonable ways to increase the productivity of the employer, e.g., decrease employee turnover, remove work obstacles, improve upon available machines and procedures, and raise employee morale.

III. *Positions of the Parties* [2]

The Agency argues, as a threshold matter, that the Union's petition for review was untimely filed under section 7117(c)(2) of the Statute since it was filed more than 15 days after the Agency first made its allegation of nonnegotiability. The Agency disagrees with the position taken by the Authority in *American Federation of Government Employees, AFL-CIO, Local 3477 and Commodity Futures Trading Commission*, 21 FLRA No. 18 (1986) and *American Federation of Government Employees, AFL-CIO, Local 3385 and Federal Home Loan Bank Board, District 7, Chicago, Illinois*, 7 FLRA 398 (1981), that an unsolicited allegation of nonnegotiability does not serve to start the time period running for the filing of a petition for review under section 7117. The Agency urges reconsideration of this policy.

As to the merits, the Agency claims that the proposal is inconsistent with section 161(d) of the Atomic Energy

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[2] The parties' arguments with respect to the negotiability of the proposal go only to Section 52.1. Section 52.2 does not appear to be in dispute and, therefore, is not specifically addressed in this decision.

Act of 1954, as amended, 42 U.S.C. § 2201, as well as management's right to determine its budget under section 7106(a)(1) of the Statute.

In response, the Union claims that the Agency has failed to substantiate its assertions that the petition for review was untimely filed and that the proposal is outside the duty to bargain. As to the former, the Union argues that in accordance with section 2424.3 of the Authority's Rules and Regulations and Authority precedent, the Agency's unsolicited allegations of nonnegotiability did not serve to trigger the time period for the filing of the petition for review. Rather, it was the Union's request for the allegation which started the time period running.

As to the Agency's arguments on the merits of the proposal, the Union claims that the Atomic Energy Act gives the Agency the discretion to negotiate. The Union states that the proposal is intended to be interpreted consistent with laws that impose limitations on pay. By way of example, the Union cites to pay limitations that are applicable to scientific and technical personnel. Finally, the Union argues that the proposal is not inconsistent with management's right to determine its budget.

IV. *Analysis and Conclusion*

The Agency has not advanced any persuasive reasons to warrant reconsideration of long-standing Authority policy that an unsolicited allegation of nonnegotiability does not commence the time period for filing a petition for review. We therefore reject the Agency's arguments that the Union's petition for review be dismissed on the basis that it was untimely filed.

We also find, for the reasons set forth below, that the Agency has failed to demonstrate that the proposal is either inconsistent with the cited provision of the Atomic Energy Act or section 7106(a)(1) of the Statute.

A. *Alleged inconsistency with law*

First, we will address the arguments made in connection with the Atomic Energy Act. The Agency cites to the following provision of that Act in support of its arguments:

> General Provisions.—In the performance of its functions the Commission is authorized to—
>
> * * * *
>
> d. appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission. Such officers and employees shall be appointed in accordance with the civil-service laws and their compensation fixed in accordance with the Classification Act of 1949, as amended, except that, *to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws: Provided, however,* That no officer or employee (except such officers and employees whose compensation is fixed by law, and scientific and technical personnel up to a limit of the highest rate of grade 18 of the General Schedule of the Classification Act of 1949, as amended) whose position would be subject to the Classification Act of 1949, as amended, if such Act were applicable to such position, shall be paid a salary at a rate in excess of the rate payable under such Act for positions of equivalent difficulty or responsibility. Such rates of compensation may be adopted by the Commission as may be authorized by the Classification Act of 1949, as amended, as of the same date such rates are authorized for positions subject to such act. The Commission shall make adequate provision for administrative review of any determination to dismiss any employee.

The Agency states that it has continued the practice of its predecessor, the Atomic Energy Commission, in

exempting all positions within the Agency from coverage under civil service laws and the Classification Act of 1949, as amended. The Agency has adopted a pay system which in many respects parallels general schedule pay rates. The Agency further states that there are three restrictions placed on its pay setting authority that would preclude negotiations over the proposal.

The first restriction concerns the authority of the Agency to deviate from pay schedules to the extent such action is "necessary to the discharge of its responsibilities." The Agency argues that since the authority to make this determination rests with the Agency, it is not subject to negotiation.

The Authority has consistently held that where an agency has discretion over a matter affecting conditions of employment, the agency is obliged under the Statute to exercise that discretion by means of bargaining, unless the discretion is specifically limited by law or regulation. *National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District*, 3 FLRA 748, 759-60 (1980). We recently have stated with regard to proposals concerning employee compensation that nothing in the Statute or its legislative history bars negotiations over such proposals where (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency and (2) the proposals are not otherwise inconsistent with law, Government-wide rule or regulation or an agency regulation for which a compelling need exists. *American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida*, 24 FLRA no. 41 (1986).[3]

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[3] *Eglin* was initially appealed to the U.S. Court of Appeals for the Eleventh Circuit. Subsequently, the appeal was withdrawn; however, appeals of other cases which rely on *Eglin* are still pending before various courts.

We do not view the language of section 161(d) of the Atomic Energy Act which allows the Agency to deviate from pay schedules to the extent such action is "necessary to the discharge of its responsibilities" as placing a specific limitation on the Agency's dscretion to bargain in this matter. In fact, the Agency has already indicated that it exempted positions from coverage under the Classification Act. Since the Agency has not identified any other specific limitation on its discretion, we find that the Agency's argument cannot be sustained.

The Agency has cited two other restrictions in the Atomic Energy Act which allegedly serve to bar negotiations on the Union's proposal. The Agency claims that there is a pay limitation applicable to scientific and technical personnel and that adoption of a 20 percent salary increase which is the effect of the proposal would cause that limit to be exceeded. In addition, for positions which are not scientific or technical, the Agency claims that a 20 percent increase would exceed the statutory maximum payable rate which is the step 10 rate for the corresponding grade under the general schedule.

The Union states that the Agency's argument that a 20 percent increase would exceed certain pay limitations and its argument concerning the amount of the increase itself are merely speculative. The Union concedes, however, that the proposal "must be interpreted consistent with the law and that law does limit pay in certain ways." Union Reply Brief at 7. Accordingly, based upon the Union's stated intent, we conclude that the Agency's claim that the proposal would require that employees' pay exceed certain pay limitations cannot be sustained.

B. *Alleged inconsistency with section 7106(a)(1) right to determine budget*

In our view, the Agency has not demonstrated that implementation of the proposal would directly interfere with management's right to determine its budget under

the test set forth in *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 FLRA 604 (1980), *enforced as to other matters sub nom. Department of Defense v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, 455 U.S. 995 (1982). That is, the proposal does not prescribe a particular program or operation which must be included in the Agency's budget, nor does it prescribe a particular allocation that must be made. Rather, the proposal concerns employee salaries, an already existing item in the Agency's budget, and merely establishes a formula for adjusting such salaries. *See also* the decision and order on remand in *National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C.*, 28 FLRA No. 80 (1987), in which a majority of the Authority found that a proposal almost identical to the one presented here was negotiable. In that case the majority held that there was no compelling need for the agency regulation and the proposal did not conflict with the agency's right to determine its budget.

We further find that the Agency has not made a substantial demonstration that implementation of the proposal will result in a significant, unavoidable increase in costs which is not outweighed by compensating benefits. The Agency argues that in determining the costs of the proposal, the percentage pay increase recommended by the President's Pay Agent rather than the Advisory Committee on Federal Pay (two entities established by the Federal Pay Comparability Act of 1970, 5 U.S.C. § 5301), should be considered. According to the Agency, a percentage increase, averaging about 20 percent over the past few years, would necessitate one of the following actions: (1) congressional approval of an increase in the Agency's budget; (2) elimination of various safety-related research programs; or (3) a reduction-in-force. The Agency also argues that even assuming a 5 percent pay increase, the figure that more closely approximates the recommendation made by the Advisory

Committee on Federal Pay, the proposal would have a substantial, unavoidable impact on the Agency's ability to determine its budget.

We must reject the Agency's arguments with respect to the possible outcomes resulting from a 20 percent pay increase. The Union indicated in its submission to the Authority that the intent of the proposal is to use the figure of the Advisory Committee on Federal Pay, traditionally a much lower figure, rather than the 20 percent figure recommended by the President's Pay Agent. The Agency's sole argument with respect to the effect of the lower figure, that is, the Advisory Committee recommendation, is that adopting such an increase would have a substantial, unavoidable impact on the ability to determine its budget and result in a certain dollar cost. Such an argument does not satisfy the requirement of a substantial showing that the proposal would result in substantial and unavoidable cost increases that are not offset by compensating benefits. *See Fort Stewart (Georgia) Association of Educators and Fort Stewart Schools*, 28 FLRA No. 67 (1987).

Additionally, as we noted in *Fort Stewart*, and previously in *Fort Bragg Unit of North Carolina Association of Educators, National Education Association and Fort Bragg Dependents Schools, Fort Bragg, North Carolina*, 12 FLRA 519 (1983), where a cost concern prevents parties from reaching agreement during the collective bargaining process, such concerns may be presented to the Federal Service Impasses Panel in a proceeding brought under section 7119 of the Statute to resolve a negotiation impasse.

V. *Order*

The Agency must upon request, or as otherwise agreed to by the parties, negotiate over the proposal.[4]

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[4] In finding the proposal negotiable we make no judgment as to its merits.

Issued, Washington, D.C., September 29, 1987.

/s/ Henry B. Frazier III
HENRY B. FRAZIER III
Member

/s/ Jean McKee
JEAN MCKEE
Member
FEDERAL LABOR RELATIONS AUTHORITY

Separate Opinion of Chairman Calhoun

I agree with my colleagues that the issues in this case are essentially the same as those in *American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida*, 24 FLRA No. 41 (1986); and *National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C.*, 28 FLRA No. 80 (1987). In my separate opinions in those cases, I stated that in the absence of a clear expression of congressional intent to the contrary, I find that wages and monetary fringe benefits of Federal employees are not a proper subject of collective bargaining under the Statute. I found no such statements of intent in those cases, and I find none here. Accordingly, I dissent.

Issued, Washington, D.C., September 29, 1987.

/s/ Jerry L. Calhoun
JERRY L. CALHOUN
Chairman

(2) (3)

Nos. 89-198 and 89-562

FILED
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL TREASURY EMPLOYEES UNION, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the wages and money-related fringe benefits of federal employees whose rate of compensation is not entirely fixed by statute are negotiable "conditions of employment" under 5 U.S.C. 7103(a)(14).

2. Whether compensation-related proposals—such as the proposal in this case to tie the salaries of employees of the Nuclear Regulatory Commission (NRC) to the recommendations of the Advisory Committee on Federal Pay—are non-negotiable because they interfere with an agency's management right under 5 U.S.C. 7106(a) to set the agency's budget.

3. Whether the proposal in this case is non-negotiable under 5 U.S.C. 7117, which renders proposals non-negotiable if they are inconsistent with federal law, because Section 161(d) of the Atomic Energy Act, 42 U.S.C. 2201(d), governs the pay of NRC employees.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-198

NATIONAL TREASURY EMPLOYEES UNION, PETITIONER

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UNITED STATES NUCLEAR REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-20a)[1] is reported at 879 F.2d 1225. The opinion of the panel (Pet. App. 21a-41a) is reported at 859 F.2d 302. The

[1] "Pet. App." citations are to the appendix to the petition in No. 89-198.

opinion of the Federal Labor Relations Authority (Pet. App. 42a-51a) is reported at 29 F.L.R.A. 217.

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on July 14, 1989. The petition for a writ of certiorari in No. 89-198 was filed on August 3, 1989. The petition in No. 89-552 was filed on October 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. 7101 *et seq.*, federal employees have the right to bargain collectively over their "conditions of employment" (5 U.S.C. 7102(2)), which are defined to include "personnel policies, practices, and matters * * * affecting working conditions." 5 U.S.C. 7103(a)(14). The duty to bargain does not extend to proposals that interfere with certain rights reserved by the Statute to agency management, including the right to "determine the * * * budget * * * of the agency." 5 U.S.C. 7106(a)(1). Nor are agencies required to bargain over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. 7117(a)(1).[2]

In this case, the National Treasury Employees Union (the Union), which represents many employees of the Nuclear Regulatory Commission (NRC), submitted a proposal for periodic cost-of-living adjustments. Specifically, the proposal (Pet. App. 4a-5a) called for an annual adjustment "equal to the statistical adjustment recommended to the

[2] Indeed, "to the extent such matters are specifically provided for by Federal statute," they are expressly excluded from the statutory definition of "conditions of employment." 5 U.S.C. 7103(a)(14).

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President" by the Advisory Committee on Federal Pay. See 5 U.S.C. 5306. The proposal further provided that the adjustment would be "unaffected by Presidential or Congressional actions." Pet. App. 4a-5a.[3] The NRC declined to bargain over the proposal.

2. The Federal Labor Relations Authority found the Union's proposal to be within the NRC's duty to bargain. Pet. App. 49a. Relying on its decision in *American Federation of Government Employees and Department of the Air Force, Eglin Air Force Base*, 24 F.L.R.A. 377 (1986), the Authority determined that proposals concerning employee compensation are negotiable "where (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency and (2) the proposals are not otherwise inconsistent with law, Government-wide rule or regulation or an agency regulation for which a compelling need exists." Pet. App. 46a.[4]

The Authority also held that the NRC had not demonstrated that the proposal "would directly interfere with the management's right to determine its budget" since the proposal "does not prescribe a particular program or operation" or a "particular allocation that must be made," but "merely establishes a formula for adjusting * * * salaries." Pet. App. 47a, 48a. Moreover, although the Authority did not dispute the NRC's contention that the proposal "would have a substantial, unavoidable impact on the [NRC's] ability to determine its budget," the Authority held that the NRC had failed to show that the cost increases

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[3] Pursuant to 5 U.S.C. 5306(b)(3), the Advisory Committee on Federal Pay is authorized to "report * * * findings and recommendations" with respect to federal pay to the President, but is granted no substantive authority to establish the pay of federal employees.

[4] The Chairman of the Authority dissented, finding that "wages and monetary fringe benefits * * * are not a proper subject of collective bargaining under the Statute." Pet. App. 51a.

would not be "offset by compensating benefits." *Id.* at 49a. It held that the NRC could not rely on Section 7106(a)(1) for those reasons.

The Authority acknowledged that Section 161(d) of the Atomic Energy Act, 42 U.S.C. 2201(d), governs the compensation of NRC employees and authorizes the NRC "to deviate from pay schedules to the extent such action is 'necessary to the discharge of its responsibilities.' " Pet. App. 47a. However, the Authority stated that it did "not view the language of section 161(d) * * * as placing a specific limitation on the Agency's discretion to bargain in this matter." *Ibid.*

3. After a panel of the court of appeals upheld the Authority's decision (Pet. App. 21a-41a), the en banc court granted rehearing and reversed. *Id.* at la-20a.[5] The court first held that the Statute "does not authorize labor organizations and federal agencies to negotiate over employee pay." Pet. App. 6a. The court found that "[a] plain reading of the text indicates that Congress did not include employee pay within the statutory definition of bargainable matters." *Id.* at 6a-7a. It further concluded that "[n]o intent to permit general public-sector wage bargaining is evident in the [Statute's] language, structure, or legislative history." *Id.* at 7a. Indeed, the court found that the Statute's legislative history was " 'replete' with indications that Congress did not intend to subject employee compensation to collective bargaining." *Id.* at 9a (quoting *Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409, 1416 (3d Cir. 1988)).

In addition, as "persuasive alternative grounds for denying enforcement of the FLRA order," five members of the court concluded that the NTEU's proposal would interfere with the NRC's right to determine its budget. Pet. App.

[5] Four of the ten judges dissented. Pet. App. 19a-20a.

13a.[6] The plurality found that the proposal would "divest the NRC of budget-making authority and transfer that authority to the Advisory Committee on Federal Pay," and "would thus clearly 'affect' the NRC's authority to determine its own budget and is therefore nonnegotiable" under Section 7106. *Id.* at 15a.[7]

The plurality also concluded that the proposal is inconsistent with Section 161(d) of the Atomic Energy Act. Pet. App. 13a-18a. It found that the NRC had permissibly construed Section 161(d) to mean that the agency "may not depart from general government pay rates until it determines that such a departure is necessary to the discharge of its responsibilities." *Id.* at 18a. Accordingly, it found the proposal non-negotiable under Section 7117 as well.

ARGUMENT

The first issue presented by the petitions in this case is identical to the first question presented by the petition in *Fort Stewart Schools* v. *FLRA*, No. 89-65, which was granted on October 2, 1989, and the second and third issues in this case are analogous to the second and third questions presented in *Fort Stewart*. Thus, while we believe that the court of appeals' decision in this case is correct, we suggest

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[6] Four members of the court disagreed with that conclusion (Pet. App. 19a-20a), and one member did not reach the issue (*id.* at 19a). A panel of the Fourth Circuit has recently adopted the position of the five-member plurality. *Navy Charleston Naval Shipyard* v. *FLRA*, No. 88-2131 (Sept. 14, 1989), slip op. 5-7.

[7] The plurality noted the Authority's contention that the NRC had failed to demonstrate that the anticipated increase in costs would not be "offset by compensating benefits," but found that "nothing in the statute requires that this showing be made to the satisfaction of the FLRA." Pet. App. 16a. Instead, it concluded that "Congress • • • vested the NRC with the responsibility of balancing employee compensation against the agency's other goals." *Ibid.*

that the Court hold the petitions for disposition in light of *Fort Stewart*.

In *Fort Stewart Schools* v. *FLRA*, 860 F.2d 396 (1988), the Eleventh Circuit held that three proposals concerning the compensation of teachers at schools for the dependents of Army personnel stationed at Fort Stewart, including a proposal specifying a 13.5% salary increase, were negotiable. In reaching that conclusion, the court found, in contrast to the Fourth Circuit in this case, that "Congress did not intend to preclude bargaining over wages and related benefits." 860 F.2d at 402. Moreover, the Eleventh Circuit found that the proposals would not interfere with the Army's right to determine its budget. It reasoned that "[t]he proposals would not necessarily increase the Army's costs," particularly in relation to the Army's total budget, including "bases, troops, weapons, vehicles, [etc.]," and that the Army had not established in any event that there would not be offsetting "compensating benefits." *Id.* at 405-406. Finally, the Eleventh Circuit rejected the Army's argument, under 5 U.S.C. 7117(a)(2), that the proposals were not bargainable because they were inconsistent with an Army regulation for which there was a "compelling need." The court held that there was no compelling need for the regulation, which required the salary schedules at the Fort Stewart Schools to be set by reference to salaries at local public schools, because it concluded that the statutory mandate (20 U.S.C. 241) requiring the Army to provide an education comparable to that provided by local public schools at a comparable per pupil cost could be met without requiring teachers' salaries to be comparable to those at local public schools. 860 F.2d at 405.

On October 2, 1989, the Court granted a petition for a writ of certiorari to review the Eleventh Circuit's decision in *Fort Stewart*. The first question presented by that petition is "[w]hether the wages and money-related fringe

benefits of federal employees whose rate of compensation is not entirely fixed by statute are negotiable 'conditions of employment' under 5 U.S.C. 7103(a)." That question is in all material respects identical to the first question presented by the petitions in this case. The second question presented in *Fort Stewart* – whether the compensation-related proposals in that case "are non-negotiable because they interfere with an agency's management right under 5 U.S.C. 7106(a)(1), to set the agency's budget" – is in many respects the same as the second question here. Thus, if that question is reached by the Court in *Fort Stewart*, its resolution is likely to be controlling here.

Moreover, if this Court reaches the third question presented by the petition in *Fort Stewart* – whether there is a compelling need for the Army's regulation mandating that teachers' salaries be comparable to those at local public schools – the disposition of that question could shed light on the resolution of the third issue raised by this case – whether the Union's proposals are consistent with Section 161(d) of the Atomic Energy Act. In *Fort Stewart*, the court of appeals' determination that there is no compelling need for the Army's salary regulation derived to a large extent from its conclusion that the Army had been granted negotiable discretion by the governing statute, which provides that, "[t]o the maximum extent practicable," per-pupil costs at dependents schools are to be comparable to those at local public schools. 20 U.S.C. 241(e). Similarly, in this case, the petitioners contend that the NRC was granted negotiable discretion because Section 161(d) of the Atomic Energy Act authorizes the NRC to fix the compensation of its employees "to the extent the Commission deems such action necessary to the discharge of its responsibilities." 89-198 Pet. 18; 89-562 Pet. 28. Thus, if this Court concludes in *Fort Stewart* that the relevant statute, which instructs the Army to set salaries in a particular manner but also

grants the Army some discretion, does not open the matter to negotiation, the basis for the lower court's conclusion in this case that the NRC does not have negotiable discretion with regard to the salaries of its employees will be strengthened.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the Court's resolution of *Fort Stewart Schools* v. *FLRA*, No. 89-65.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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